TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 207.

THE IOWA RAILROAD LAND COMPANY, PLAINTIFF IN ERROR,

vs.

CLAUDE F. BLUMER.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

FILED FEBRUARY 16, 1906.

(20,098.)

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1 In the Supreme Court of Iowa, January Term, 1905. In Equity.

CLAUDE F. BLUMER, Appellee,
vs.
IOWA RAILROAD LAND COMPANY, Appellant.

Appeal from Woodbury District.

Hon. J. F. Oliver, Judge.

Lohr, Gardner and Lohr, Attorneys for Appellee.
Chas. A. Clark & Son, Wm. G. Clark, Attorneys for Appellant.

Due, legal and timely service of Ap-ellant's Abstract is hereby accepted and copies received this — day of December, A. D., 1904.

Attorneys for Appellee.

Appellant's Abstract.

On October 23rd, 1902, appellee as plaintiff, filed in the office of the clerk of the District Court of Woodbury County, Iowa, his

2 *Petition in Equity*

as follows:

Plaintiff for cause of action against the defendant states:

Par. 1. That he is the owner in fee simple of the following described real estate situated in Woodbury County, Iowa, to-wit: The northeast quarter of the northeast quarter (NE¼ NE¼) of Section one (Sec. 1,) Township Eighty-nine, (T 89) North, Range Forty-six, (R 46,) West, containing about forty acres according to the government survey.

Par. 2. That plaintiff and his immediate grantor have been in the open, notorious, exclusive, continuous adverse possession of said real estate under a claim of right and title for more than ten years preceding the commencement of this suit, and that plaintiff is now in the possession of the same.

Par. 3. That plaintiff is credibly informed and believes that defendant makes some claim to said real estate adverse to the plaintiff's estate therein.

Par. 4. That said defendant is a corporation duly organized under the laws of the state of Iowa, relating to the organization of corporations for pecuniary profit, and is doing business in said state as such corporation.

Wherefore, the plaintiff prays that his title in and to the real estate above described be quieted and confirmed, and that the defendant be barred and estopped forever from having or claiming any right or title to said premises adverse to the plaintiff, and that

plaintiff have judgment quieting his title therein against the adverse claims of defendant, and for such other and further relief as may be just and equitable, and for the costs of this action.

Said petition was duly verified.

Thereafter on November 6th, 1902, appellant filed in said cause the following

3 *Answer.*

For answer to plaintiff's petition defendant states:

Par. 1. Defendant denies that plaintiff is the owner in fee simple of the real estate described in his petition, and denies that plaintiff has any right, title or interest therein, or any claim thereto, or color of right or title thereto.

Par. 2. As to whether plaintiff and his grantors have been in possession of said real estate for more than ten (10) years prior to bringing such action, this defendant has no knowledge or information sufficient to form a belief.

Defendant states that in event plaintiff has been so in possession, such possession was in no sense adverse to the rights of this defendant, and that the same are without color of title or claim of right to said real estate, and was at the sufferance merely of the owner and holder of the legal title of said real estate.

Par. 3. For further answer to paragraph 3 of said petition, defendant states that the legal title to said real estate is, and at all times mentioned in plaintiff's petition has been in the United States. That on or about the 15th day of May, 1856, the Congress of the United States passed a certain Act to aid in the construction of a line of railroad from Dubuque to Sioux City, in the State of Iowa, which said Act was entitled "An Act Making a Grant of Lands to the State of Iowa in Alternating Sections to Aid in the Construction of Certain Railroads in said State," and was approved on said last mentioned date, and which Act granted said lands to the State of Iowa in trust for the railroad companies which should be designated by said State to complete said roads and to earn said grants, which said Act and trust was duly accepted by the said State of Iowa by an Act of the Legislature of said State approved July 14th, 1856.

That thereafter, by a certain Act approved April 7th, 1868,
4 and being Chapter 124 of the Acts and Resolutions of the Twelfth General Assembly of the State of Iowa, the said State of Iowa designated the said Iowa Falls and Sioux City Railroad Company to construct and complete the then incompleted portion of said road west of Iowa Falls and granted on conditions contained in said Act the unearned portion of said land granted west of Iowa Falls to said Iowa Falls & Sioux City Railroad Company, excepting however, certain lands granted to the Dubuque, Belleview & Sabula Railroad Company.

That the Iowa Falls & Sioux City Railroad Company duly constructed its railroad and became entitled to the lands provided for in the aforesaid Acts of Congress and of the Legislature of Iowa.

That the land in question was selected and designated by the State

of Iowa as a portion of the lands granted and received by said State under said Act of May 15, 1856, during said year of 1856.

That said tract of land was again selected and designated by the Iowa Falls & Sioux City Railroad Company on June 19th, 1884, and again on April 24, 1885, as lands to which said Company was entitled under the aforesaid land grants, which said selection and designation was duly filed in the office of the Land Commissioner of the United States, at Washington, D. C.

Par. 4. That on March 28th, 1887, the Iowa Falls & Sioux City Railroad Company sold and conveyed to the defendant, Iowa Railroad Land Company, all its remaining unsold lands, and all its claims for lands under the grant aforesaid, including the claim to the land in controversy in this action.

Par. 5. That the Iowa Falls & Sioux City Railroad Company and this defendant, having duly made application to the Land Commissioner of the United States that title to the land in question be certified and conveyed to said Iowa Falls & Sioux City Rail-
5 road Company, which said application was so made and filed with said Commissioner on ——— day of August, 1891, and which said conveyance and certification would enure to the benefit of this defendant under the aforesaid conveyance from said Railroad Company to defendant.

Par. 6. That as defendant is advised and states said Land Commissioner has at all times held said land to be rightfully subject to certification and conveyance to said Railroad Company under said grant, but has neglected and failed to make such certification and conveyance although often requested by defendant and by said Railroad Company so to do.

Par. 7. The defendant on information and belief, charges and avers that the sole and only claim of plaintiff in or to the premises in question arises through one John Carraher, who, at some date unknown to this defendant, made an entry of a timber claim in and to said real estate in the proper office of the Land Department of the United States.

That it was within the jurisdiction and power of the Land Commissioner of the United States to pass upon and finally determine the nature, validity and extent of any rights of said Carraher under and by reason of said timber claim entry as against the conflicting claim of said Railroad Company under said railroad grant, and the aforesaid selection of said land thereunder.

That said Land Commissioner, after due notice to said Carraher, on July 11th, 1891, acting within his jurisdiction and powers rejected said timber claim and cancelled the same for conflict with the rights of said Railroad Company and this defendant, which said ruling of said Commissioner was and is binding upon plaintiff as grantee of said Carraher, and is not subject to the review of this honorable court.

That all the foregoing facts are, and at all times have been well known to the plaintiff.

6 Par. 8. That by reason of the premises the legal title and ownership of said land still remains in the United States. That plaintiff has no right or claim in or to said real estate. That

any acts of possession or control of said real estate by plaintiff have been at the sufferance of the United States, and beyond the right or control of this defendant to interfere with or resist in any manner, for that defendant has not yet been invested with the legal title thereto.

That the determination of the rights of the parties is solely within the jurisdiction and powers of the Land Commissioner of the United States subject to an appeal to the Secretary of the Interior.

That this honorable court is wholly without jurisdiction or power to try the aforesaid rights of the parties in and to said real estate.

Wherefore defendant prays that plaintiff's petition be dismissed, and that defendant have judgment, and costs.

Said answer was duly verified.

On December 31, 1902, plaintiff filed in said cause his

Reply

as follows:

Comes now the plaintiff and for reply to the answer of defendant denies each and every allegation therein contained, except such as are hereinafter specifically admitted.

Par. 2. Plaintiff admits all the allegations of paragraph 3 of said answer, except the legal conclusion of the first sentence of said paragraph, that the legal title to the real estate is and at all times has been in the United States, which he denies.

Par. 3. He admits the allegations of paragraph 4, and as to those of paragraphs 5 and 6, he has neither knowledge nor information sufficient to form a belief.

7 Par. 4. He admits the allegation of paragraph 7 that he claims title to said real estate through one John Carraher as his grantor, and that said Carraher about the year 1887 made an entry of a timber claim for said real estate in the office of the Land Department of the United States, and that about the 11th day of July, 1891, said timber claim entry was cancelled by the Commissioner of the General Land Office of the United States, but denies that said timber culture claim was the sole or only source of claim of right or title to said real estate by said Carraher.

Wherefore, said plaintiff prays as in his original petition.

On January 31, 1903, plaintiff filed in said cause the

Amendment to Reply.

as follows:

Comes now the plaintiff in the above entitled cause and for amendment to his reply herein alleges and states:

Par. 1. That the land in controversy in this action is a part of and within the six miles limit of the land granted to the state of Iowa by the act of Congress of May 15, 1856, which act is found in the 11th Statutes at Large 9 of the United States, to aid i nthe construction of a railroad from the city of Dubuque in the state of Iowa to a point on the Missouri river, near Sioux City, in said state. That the lands

granted by said act to said state for the purpose mentioned were, by the act of the legislature of Iowa, passed July 14, 1856, granted to the Dubuque & Pacific Railroad Company, on the terms contained in said act and in the act of congress aforesaid.

Par. 2. That the map of the definite location of the line of said railroad was filed in the office of the commissioner of the general land office of the United States on October 13, 1856, by said railroad company, and the location of the line of said railroad was thus definitely fixed.

8 Par. 3. That when the definite location of said railroad became fixed by the filing of said map, all the land granted by said act of congress within the six mile limits of said grant passed to the state of Iowa in trust for the uses and purposes mentioned in said act.

Par. 4. That thereafter said Dubuque & Pacific Railroad Company became insolvent and all its property and rights were acquired by the Dubuque & Sioux City Railroad Company, which said railroad company built said road from Dubuque to Iowa Falls in said state of Iowa, in accordance with the provisions of the acts of congress and of the legislature of the state of Iowa, as aforesaid.

Par. 5. That thereafter, as alleged in defendant's answer, the state of Iowa designated the Iowa Falls & Sioux City Railroad Company to construct and complete the incompleted portion of said road west of Iowa Falls, and granted to said railroad company on conditions contained in said act referred to, the unearned portion of lands formerly granted to the Dubuque & Pacific Railroad Company, excepting certain lands as stated in said answer.

Par. 6. That said Iowa Falls & Sioux City Railroad Company constructed said railroad from Iowa Falls to Sioux City in said state of Iowa and duly completed said road in accordance with the provisions of the acts of congress and the legislature of Iowa, prior to the first day of January, 1872.

Par. 7. That upon the construction and completion of said road as prescribed by the act of the legislature of Iowa aforesaid, the said lands granted by the act of congress in trust to the state of Iowa, were earned by said Iowa Falls & Sioux City Railroad Company and passed to said railroad company under said acts and said railroad company became absolutely and legally entitled to the same.

9 Par. 8. That thereafter and during the year 1888 the plaintiff's grantor, John Carraher, acting on the claim and believing that the land in controversy was public land of the United States and subject to entry under the tember culture laws of the United States, went into possession of the same and filed his claim therefor in the land office of the United States at Des Moines, Iowa, and paid the fees allowed by law in cases of timber culture claims, and received a receipt for the same from the proper officers in charge of said land office, and plaintiff and his grantor have been in possession of said land ever since under said claim of right and color of title, and have continued to occupy, improve and cultivate the same.

Wherefore, plaintiff prays as in his original petition.

Thereafter, on May 28, 1904, appellant filed in said cause its

Supplemental Answer and Counter Claim

as follows:—

The defendant, by leave of Court, for supplemental answer and counter claim, states:

Par. 1. That since its formal answer was filed in this cause, the Secretary of the Interior and the Commissioner of the General Land Office of the United States, to-wit, on the 24th day of January, 1903, made and executed their certain certificate whereby the land involved in this action was certified to the State of Iowa in trust for the Iowa Falls and Sioux City Railroad Company, which said certificate was duly filed for record in the office of the Recorder of Woodbury County on the 2nd day of February, 1903, and recorded in Book 54, Lands, page 114, of said office; that thereafter, on the 2nd day of February, A. D. 1903, the Governor of the State of Iowa in pursuance of Chapter 124 of Acts of the 12th General Assembly of said State, issued and delivered to the said Railroad Company
10 a patent of said lands, whereby the said title thereto was conveyed from the said State of Iowa to the said Iowa Falls & Sioux City Railroad Company and its assigns; which said patent was duly filed for record in the office of the Recorder of Woodbury County, Iowa, on the 10th day of February, A. D., 1903,and recorded on page 219 of Book 54, Lands, of said office.

Par. 2. That, by a previous conveyance made and executed on the 20th day of March, A. D., 1887, the said Iowa Falls & Sioux City Railroad Company sold and conveyed the aforesaid land and all lands to which it was entitled under said grant to the defendant, Iowa Rail Road Land Company, it being expressly recited in said conveyance "That the said bargain and sale according to its true intent and meaning includes not only the rights, interest and claims of lands granted by Congress afore mentioned and which have already been ascertained as a part of said land grant and certified as such and not already disposed of, but also and in addition thereto all the lands, interest and claims to land rightfully belonging to said grant which have not been definitely ascertained as grant lands and so certified, and to which said party of the first part (The Iowa Falls & Sioux City Railroad Company) may at any time hereafter become legally entitled. That said mentioned conveyance was duly filed and is of record in the office of the Recorder of Woodbury County, Iowa. That under and by virtue of said last mentioned conveyance the aforesaid certificate of the United States Land Office and the aforesaid patent of the Governor of Iowa enured to the benefit of this defendant, and the legal and equitable title and ownership of the aforesaid land became vested in this defendant. Defendant states that its aforesaid title and ownership is superior and paramount to any claim of title, ownership or interest in said land of plaintiff herein, and that this defendant is entitled to the immediate possession of said real estate.

11 Wherefore, this defendant prays that its title in and to said real estate be quieted as against the claims of plaintiff,

and that plaintiff be decreed and required by proper process of this Court to deliver possession of said real estate to this defendant; and the plaintiff, his grantees, assigns or servants be enjoined and restrained from entering upon said real estate or interfering with defendant's possession and title thereto, or from making any claim of any interest or ownership therein.

Duly verified.

On June 29, 1904, plaintiff filed in said cause his

Amendment to Reply

as follows:

Comes now the plaintiff herein and for amendment to his reply herein alleges and states:

That for more than ten years prior to the commencement of this suit the plaintiff and his immediate grantor have been in the open, notorious, exclusive, continuous, adverse possession of the real estate in controversy under claim if right and color of title and that plaintiff is now in possession of the same under the same claim of right and color of title.

Wherefore plaintiff prays as in his petition and further prays that the defendant's supplemental answer and counter claim be dismissed.

Said answer was duly verified.

On May 28, 1903, said cause came on for trial in said court before Hon. J. F. Oliver, presiding judge, whereupon the following evidence was introduced and the following proceedings had, viz:

12 *Plaintiff's Evidence.*

Plaintiff offers in evidence Exhibit "A" being a receipt from M. D. McHenry, receiver, dated Receiver's Office, Des Moines, Iowa, May 3, 1888, to John Carraher for nine dollars, being amount of fee and compensation of register and receiver for the entry of N. E. — of N. E. ¼, Section 1, Township 89, Range 46, under first Section of Act of Congress approved June 14, 1878.

It is agreed by the parties that all interrogatories and evidence shall be taken subject to objections as incompetent, immaterial, irrelevant and secondary or any other just legal objection thereto in any court to which this cause may be taken, and shall apply to direct and cross examinations.

Plaintiff read in evidence the deposition of R. W. CARRAHER, as follows: I live in Leeds, a suburb of Sioux City. I came to Woodbury county in 1871; I left here in September, 1894, and came back in 1898; during all the rest of the time I lived in this county. Since 1898 I lived in Hornick, Iowa, until 1901. Until September, 1904, I lived in Banner township, Section 6. I am a son of John Carraher. John Carraher died October 30, 1891.

I am acquainted with the N. E. ¼ of the N. E. ¼ of Section 1, 89–46, Woodbury county, Iowa. I have cultivated this land. I am not positive whether I cultivated it in 1890, but I cultivated it in

1891–2–3 and 4. I cultivated somewhere between 18 and 20 acres. Of the balance part was hay and a six or seven acres never was broke. I cut the hay during the time I cultivated it, for my father. I was at home then working with my father. Either Charlie Reid worked in 1890 or I did. About three acres of trees have been planted on it, in 1890, by my father and John Downey, and I think a man by the name of Parker helped. Those trees are growing now. Some may be dead. I think this land was broke in 1888; my father
13 broke the three acres where the trees are and Harrison broke about seventeen acres. I was present part of the time when Harrison broke the seventeen acres. He was employed by my father. It was cultivated in 1889 by C. I. Reid for my father, from whom he rented it. There was between eighteen and twenty acres. There was a place adjoining us on the north that had been broken up quite a while before, and they broke over the line about three acres on this forty; I think father paid for breaking seventeen acres there. That was in 1898. In 1889 on a portion of the land that was not broke they cut hay and a portion they never did anything with. I could not say positively whether Reid cut the hay that year or whether father and I did. My father claimed to own the land at the times I have mentioned. We had an eighty that joined it on the north but it was in Plymouth county. It was called the forty, the tree claim sometimes, and once the sandpit forty. There was a sandpit on it. There was no other sandpit in that neighborhood that I know of. My father deeded this forty to my nephew a short time before his death. He always talked just the same of that as he did of any of the rest of the land he owned there.

Cross-examination:

I think my father died the 30th of October, 1901. The nephew to whom he deeded the land was Claude Blumer, the plaintiff in this action. I could not tell you the date of the deed. I did not know of the circumstance of the tree claim entry being cancelled by the department. Lawyer Wakefield looked after it here in town. I knew he had a lawyer look after it but I never knew there was a contest former to my father's death. I am 33 years of age.

Plaintiff also read in evidence the deposition of D. E. KIRBY, as follows:

I live in Sioux City; lived here for 15 years. My occupation is loans, insurance. I have bought land at tax sales. That
14 has been part of my business. I bought at tax sale in 1895 in Woodbury County, Iowa, N. E. ¼ of N. E. ¼, Section 1-89-46. I have in my hand the tax certificate register in which we register all lands purchased by us at tax sales. I suppose we received a certificate for that land at that sale. On the margin here is marked, "Assigned to John Carraher."

Cross-examination:

I have no entry that shows whether the certificate was cancelled or redeemed or what became of it other than that we assigned

it to Carraher. It is in my own handwriting here but I do not remember anything further. I do not know whether any tax deed issued on it or not.

Redirect examination:

I do not know what was done with this certificate other than it must have been delivered to Mr. Carraher. Just the regular assignment that is on the back of the certificate. We never made any separate assignment on a separate piece of paper that I have a recollection of. There is a blank space on the back of the certificate to be filled out for the assignment of each certificate. Just what the records say here is all I have to go by.

Recross-examination:

I have no independent recollection about it all.

Redirect examination:

Our custom about making entries after disposal of a certificate which we had purchased was we usually put on the margin "Assigned—sold to such and such a person or party." In case it is redeemed we have a place it is marked redeemed. The certificate is delivered when it is assigned, not when redeemed.

Plaintiff also read in evidence the deposition of Mrs. HOPE BARNHOLTZ, as follows:

15 I live in Lincoln Township, Plymouth County; fifteen miles from here. I am a grand-daughter of the late John Carraher. I am acquainted with this forty acres in dispute in this case. It it situated in the N. E. ¼ of the N. E. ¼, in north-east part of Concord Township. It is the north-east forty of the township. My grandfather planted cotton-wood trees on it in 1890. I was small then and helped carry the trees along as he set them in. About three acres were planted then. The trees are growing now. R. W. Carraher and C. I. Reid farmed it the year the trees were planted.

Plaintiff also read the deposition of ELMER CALKINS as follows: I live in Leeds in this city. Have lived there two years. I came from there to testify in this case. Before moving to Leeds I lived on Mr. Carraher's place, in Section 6, Banner Township of this County. I have lived in Woodbury County about fifteen years except two years I was away. I have been acquainted with N. E. ¼ of the N. E. ¼ of Section 1, in Concord Township, this County, ever since I worked it in 1896. I raised oats on it that year; rented from Mr. John Carraher. Paid the rent to John Carraher. Share rent. Louis Rentle worked it in 1897. He is now in Winatchi, Wash. I saw Louis Rentle and John Carraher talk the bargain over in my house when I was living on the place. Mr. Carraher was living with me at the time. I worked it the year 1897. During the years 1896 and 1897 I heard a good many times Mr. Carraher speak of his owning the forty; he was there a good many

times when I worked it. I saw him there two or three times during the summer when Rentle was working it. He was there to see how he was working it I suppose, talking with Mr. Rentle. This was in the spring, in March, I believe I heard the talk between him and Rentle about renting it. Rentle raised a good fair crop
16 that year I think. He had corn on it. I don't know whether he had shares or cash rent. I think he delivered corn to Mr. Carraher. They claimed there was 22 acres under plow those two years. The rest was hay and there was a small grove. About two or three acres of cottonwood. The grove was in good shape then; trees all living and growing nice. Balance was most in hay—two or three acres of weeds. The year I had it I had the hay cut but I don't think it was cut the year Rentle had it.

Cross-examination:

I know nothing about Mr. Carraher's title, how he acquired title, or whether he had title to the land.

Plaintiff further read deposition of ALBERT WOLETT, as follows: I knew John Carraher one year when I worked some land of his in the northeast part of the township, in 1898. I don't know the name of the township it was in. We lived in Plymouth county. Never lived in this county. I think it was on the east end of the township. The line of the north end of it is the Plymouth county line. It is in the northeast corner in that township. We rented twenty acres from old man Carraher that year. Raised wheat on it. Had a written lease. I don't know what became of that. I could not tell who we paid the rent to. My brother said he was going to pay the old man the rent. It was in my brother's name. I worked for him that year. I did not cut the hay that year. We never cut it. Mr. Carraher said we should have the hay. I don't know whether he meant from that forty or his eighty; we had 100 acres rented from Carraher; there were trees on this forty; about three acres; there was a sand pit on it. When I talked with Mr. Carraher he let on he owned it. I live in Plymouth county, twenty miles from Sioux City.

ELMER CALKINS, re-called.

Redirect:

When I farmed this land in 1898 I did not have a written
17 lease; I paid the rent to Mr. Carraher. I cut the grass on this the year George Reid had the farm land.

Also the deposition of GEORGE REID: I live in Woodbury county about six miles east of Leeds and a mile north. About twelve miles from here. Have lived in this county two years. Before that I lived in Plymouth county. I knew John Carraher since 1899. I rented some land of him. It was the N. E. ¼ of the N. E. ¼. Section 1, Township 89, Range 46. In the northeast corner of the township. The northeast forty. I rented it of Carraher in

1899. I had only the tillable land rented; about twenty-two acres. I paid rent to Mr. Carraher. Cash rent. Mr. Calkins had the hay that year. He cut all the hay that was cut there that year. About three acres of the land is in cottonwood trees. I could not say the condition of the trees.

Mr. Carraher always claimed to own this land in my business relations with him that year. He did not say anything about claiming to own it. He spoke of it as his forty.

Cross-examination:

I rented about 20 or 22 acres. Raised corn on it. Cash rent something like $2 an acre. I just paid for the tillable land on that forty. I don't know what the hay land rented for.

Redirect:

I saw Mr. Carraher there during the year I worked it, two or three times. I saw him about the trees. He had his horse tied there and was in the grove. No one else came near me and made any claim to own the land.

Mr. CALKINS recalled.

Redirect:

I cut the hay on this land during 1899. I was to give Mr. Carraher a share of the hay. I did give him a share. That was in 1899. Mr. George Reid worked the tillable part that year. I lived in the next section to this land for five years and 18 then I was within three miles of it about fifteen years. During all that time this forty was generally known in that neighborhood as John Carraher's, all that I ever knew it to go by. I never heard of anyone else making any claim to it, or being in possession of it, cutting hay or raising any crop on it, or anything of that kind. Mr. Carraher lived in my house two years, 1896 and 1897. In 1898 he was on another place of his in Concord Township. In the same section as this forty. He was a widower. The year his wife died I moved onto this place in Banner Township, east of this forty, just cornered onto it. That was 1896. Lived there five years. During this time I saw Mr. Carraher on his forty a good many times. Other than times when I worked it. After I worked it a couple of times I was hauling sand from this forty and he was there. The last time I saw him was four years after I worked it; the last time I was on his place. Between the time I worked it and this last time I saw him there a good many different times. I knew of his selling sand to people. There was no other sand pit in that neighborhood that I knew of. The sand pit was nearest to the south. The trees were in the southeast corner. I know of four or five different persons who got sand there, of Mr. Carraher. Two of them I know went to the house when he was at my place and saw him about getting sand there. There are no bulidings on this forty. The tillable part of the land is on the north side. Runs pretty close to the west line. Grass

land is in south-west corner; same as the trees, on the south side; hay in the west part and trees in the east, on the south. The hay land extends in a three cornered piece in south-west corner.

Recross:

I worked the land one year, 1896. I got one-third share. It was wheat. The land ordinarily rented around $2.00 per acre.

Also the deposition of CLAUD BLUMER: I am the plain-
19 tiff in this cause. I am a grandson of John Carraher who died in 1901. I am the same person to whom a quit-claim deed of the land in controversy in this cause was conveyed by John Carraher October 26, 1901. That was about eight days before he died. I have been acquainted with this land for some time; that is I knew of it. I have cut grass on it during 1902, 1901, 1900. During 1900 and 1901 I rented it of my grandfather. I did not have a written lease. He gave me the hay off of it. I cut the hay. Bill Ried worked the tillable part of it during 1900. I am almost certain that he rented it of my grandfather. I know he paid the rent to my grandfather that year for my wife was teaching school up there and he told her to stop and get the rest of the rent. Otto Zeiglan worked the tillable part in 1901; he rented of my grandfather. He paid the rent to me; my grandfather gave me an order on Zeiglan to pay it to me. He paid it to me. Nick Stussin farmed it during 1902. He paid the rent to me. Exhibit "C" is the lease my grandfather made to Nick Stussin. Plaintiff offers Exhibits "B" and "C" in evidence: Exhibit "B" being a quit claim deed of date October 26, 1901, from John Carraher, (a widower) to Claude F. Blumer, for the consideration of five dollars to all of the N. E. ¼ of the N. E. ¼, Section 1, Township 89, Range 46 west of the 5th P. M., situated in Woodbury county, Iowa.

Exhibit "C" being a farm lease made and entered into September 21, 1901, between John Carraher, party of the first part and Nick Stussin, party of the second part, leasing to party of the second part all the cultivated land in the N. E. ¼ of the N. E. ¼ of Section 1, Concord township, Woodbury county, Iowa, containing twenty-one acres more or less, from September 21, 1901, to January 1, 1903, the second party agreeing to pay as rent for said premises $45.00 on or before the 1st day of September, 1902.

20 Defendant objects as incompetent, immaterial, irrelevant. During the time I have been acquainted with it my grandfather always claimed this was his forty. Said a good many times it was his forty. During the past ten or twelve years I have lived with my grandfather most of the time. That is only half a mile from the forty. In that neighborhood this land was called my grandfather's. About eighteen or twenty acres of it is cultivated but it run over the line a little; about twenty-two or twenty-two and a half acres broke up now. Rest of it is hay ground. About three acres of trees. I had the hay on the ground during the last three years. Before 1902 got it from my grandfather. He gave me the hay on it during 1900 and 1901. Previous years I remember Elmer

Calkins cutting the hay, in 1899. I am pretty sure he rented it from my grandfather. I know my grandfather had it cut two or three different times because I have helped haul hay from there. In 1892 or '3 or '4, something like that. I don't know of his cutting hay any years since then. For the year 1902 Uncle Matt paid the taxes and I paid him. Plaintiff offers in evidence exhibit "D" being tax receipt of Treasurer's Office, Woodbury county, Iowa, Sioux City, Iowa, Feb. 25, 1902, Received of Claud Blumer $9.72, N. E., N. E., 1, 86, 46; 33.95 acres, $9.72, Concord, J. A. Morgan, Jr., County Treasurer. Defendant objects as incompetent, immaterial, irrelevant. Plaintiff again offers Exhibit "A." Defendant objects as incompetent, immaterial, irrelevant.

And the deposition of CHARLES I. READ, as follows:

I live about 16 miles north-east of here in Plymouth County, lived there 14 years. I was acquainted with John Carraher who died in the fall of 1901. I rented land of him every year since I have been here until he died. I rented the N. E. ¼ of the N. E. ¼, Section 1, Concord Township, in 1890 and 1891 for myself and in 1895 I rented it for my brother. I cultivated it in 1890; on the
21 forty there is something like 20 acres cultivated. Raised flax on it that year. That year I paid the rent to the old gentleman, Mr. Carraher. I think Mr. Carraher cut the grass in 1890. I think the trees were planted that year. In 1891 I cultivated the same amount as the year before. I think the Carrahers cut the grass that year. In 1891 I paid the rent to Mr. Carraher. In 1895 I rented this same land of Mr. Carraher; oral lease. My brother worked it that year. I rented it for him. That year my brother cultivated about 18 or 20 acres. My brother cut the hay in 1895. I rented all of it that year including the hay land. My brother paid the rent to Mr. Carraher. I saw that it was done. I think about three acres of that land is in trees. I have seen the trees lately. They were in very good condition and taken care of when I saw them. I lived two miles from this forty. I knew of Mr. Carraher cultivating the trees those years. I saw the trees this last fall and they were in good condition. Cottonwood trees. Mr. Carraher claimed this forty really, and hired it broke. I know the man that broke it, and Mr. Carraher hired him. I did not see the contract but I heard it talked over afterwards, that Mr. Carraher hired this man to break the land. It was broke somewhere along 1888 or 1889. During the years I rented it I saw Mr. Carraher on the land, cultivating the trees one time, working there. He was over there every once in a while when I was on the land taking care of the crops. I know of his being there when other people were cultivating it. About the same frequency I suppose. During the past ten years Mr. Carraher claimed to be the owner of it. I never heard of any one else claiming to own it or exercising any ownership of it.

Cross-examination:

In 1890 and 1891 I rented the land; 1890 was cash rent. I think about $2.00 an acre, for the cultivated land. About 20 acres. The

year I rented it for my brother he got the hay land in; the
22 two years I farmed it myself Mr. Carraher cut the hay on that land. In 1895 I rented it for my brother, Joe Reid. He is not here. Mr. Carraher had quite a bit of land in that neighborhood; besides this piece I rented land of him in Plymouth County. 240 acres there he rented to me. He also owned a large amount of land in Woodbury County. I live about 16 miles from Sioux City, in Plymouth County.

Plaintiff also read the deposition of W. R. REID, as follows:

I live sixteen miles north-east of here in Plymouth County; have lived there 11 years; before that I lived in the south part of the state. I knew John Carraher when he was living. I rented land of him. I don't know of any in particular only 1900; that year I rented 40 acres of tree claim right back of Downey; I think it is Banner Township. I am not certain. No, I don't know what township. It is to the north side of the Township and joins Plymouth County. I had a lease of this forty. Exhibit "H" is the lease I had of John Carraher during the year 1900. That included a forty in Woodbury County. I knew that forty as a tree claim. About 20 or 22 acres in that forty cultivated, north and east corner like, more on the north side; run down almost full length onto the west. Probably two acres of cottonwood trees on the south-east corner; about 18 acres of grass land. This is the same forty my brother, George Reid, worked the year before I did. My brother Charles worked it about the time I came here; I could not tell what years. Exhibit "H" is the lease I received from John Carraher. I farmed it in wheat that year. Paid rent to John Carraher. I think Claud Blumer cut the grass that year. John Carraher claimed to own the land the year I worked it. He claimed to me to own it. I never heard any one else making any claim to it.

Plaintiff offers Exhibit "H" in evidence. Defendant objects as incompetent, immaterial, irrelevant.

I made the lease at the time of year it bears date.

23 OTTO ZEIGLAN: I was acquainted with John Carraher during his lifetime. I had known him about 5 years. At present I live about 18 miles from here, in Plymouth county. Came here today to give my testimony. I rented some land of John Carraher the year he died; I think that was 1901. I rented the plow land in the forty in the north-east corner of Concord Township. I raised a pretty fair crop of corn that year. I paid the rent to Claude Blumer. The old gentleman was sick and he wrote an order for me to pay Claude. I rented it in the spring of 1901, from John Carraher. I think Mr. Blumer cut the hay on the forty that year but am not positive. There were anyway two acres of cottonwood trees on this forty. They were in good condition in 1901. I do not know when they were planted. I could not say how old they appear to be. At the time I rented the land I supposed Mr. Carraher owned it. He did not say who owned it. He called it his land. At that time I lived about a mile from it. I think the general reputation was that

Mr. Carraher was the owner of the land at that time. I never heard anyone else making claim of ownership to it. I have known the land for abut five years. I lived in that neighborhood the last nine years. I moved where I now live this winter.

CLAUDE F. BLUMER, recalled: I know of Otto Zeiglan working this land in controversy in 1901; Nick Stussin in 1902; it was the same land the other witnesses have testified about.

Also the deposition of CHARLES N. MARTIN: I live in Sioux City; am deputy county treasurer; have been since 1894. I yesterday examined the books and records of my office with reference to the assessment and payment of taxes to N. E. ¼ of N. E ¼ of Section 1, Township 89, Range 46 in this county.

Q. In whose name was it taxed in 1895?

A. Taxed unknown. During that year the taxes were paid in the name of John Carraher. 1896 to 1901 inclusive this land
24 was taxed in the name of John Carraher. The same years the taxes were paid in the same name. In 1902 the same land was taxed in name of Claude F. Blumer. Taxes for 1902 have not been paid. They were just due the first day of January and have not yet been paid. My examination did not go further back than 1895.

Testimony Taken at May Term, 1903.

CLAUDE F. BLUMER duly sworn testified: I am plaintiff in this case. I am the same Claude Blumer who testified by deposition and whose deposition is offered in evidence. I heard the deposition of Albert Wollet at the time of taking his deposition, in regard to working or renting some land of John Carraher for year 1898. I know about his working that land that year. He paid the rent to my grandfather, John Carraher, that year. I was present when he paid it to him. It was the same year, after he had his crop. Late in the fall of 1898. I know it was on the land in controversy. I have paid taxes on this land in controversy for the year 1902.

Plaintiff offers in evidence Exhibit "I," being a tax receipt for the year 1902 from J. A. Morgan, Jr., County Treasurer Woodbury County, Iowa, to Claude F. Blumer, $7.92 taxes, N. E., N. E., 1-89-46, dated March 20, 1903.

Defendant objects as immaterial, irrelevant, incompetent.

Q. Do you know the number of trees that are now standing and growing on the land in controversy?

Defendant objects as incompetent, immaterial, irrelevant.

A. There are over twenty-three thousand. 260 in length and 80 in width. In another patch there must be about two or three hundred. Exhibit "A" was found amongst my grandfather's papers after his death, and was given to me. I testified I had received my deed before his death; and this was among his papers at the time of his death.

25 Cross-examination:

Those trees were planted by my grandfather in 1888 and 1889. I think a few of them were planted a year later, in 1890.

GEO. W. WAKEFIELD, being duly sworn, testified: I am one of the judges of this Judicial District. I knew John Carraher, formerly of this county in his lifetime. I took some part in some correspondence for him in regard to a timber culture entry in this county for land in this county. Exhibit "J" recalls to me correspondence I conducted for him. From the contents of the letter I am quite certain I received for him from the receiver of the land office at Des Moines, Iowa, a timber culture entry receiver's receipt number 607, for the N. E. ¼ of the N. E. ¼, section 18, township 91, range 46, in May or June, 1888. This letter, Exhibit "A," was written by me and sent to John Carraher. That receiver's receipt referred to therein was enclosed in this letter.

Plaintiff offers in evidence Exhibit "J," as follows:

SIOUX CITY, IOWA, *June* 2, 1888.

Mr. John Carraher.

MY DEAR SIR: I have the pleasure of handing you herewith your timber culture entry Receiver's receipt No. 607 for N. E. ¼ of N. E. ¼, 1, 89, 46.

Respectfully, GEO. W. WAKEFIELD.

P. S.—You can take possession and proceed to comply with the timber culture laws.

Cross-examination:

I was not in general practice at the time that letter was written. Mr. Carraher had talked with me something about the matter before, while I was in general practice, in a general way. I wrote several letters for him before I went on the bench and the department having my name would send letters to me.

26 My present impression is this came to me in part because of that fact. I did not appear before the department about the subsequent cancellation after I went on the bench other than as things may have come to me and I passed them on to Mr. Carraher. Mr. Carraher once or twice spoke to me in a general way about the progress of it.

Q. You knew there was a contest in progress over the entry then?

A. As to the exact situation I do not know. I knew there was some questions. I recall there was some matters that he talked to me about, and reported to me something about the matter, whether before this letter was received or later I would not be able to state. It related to securing an entry upon the land. Whether he had a right to make it before, if he had not made it, I don't know as to that. I had known Mr. Carraher since the seventies sometime. He owned a half section of land, or something in that neighborhood, out there. He was a man of a good deal of natural intelligence. I think

he had a quick grasp of anything that related to his interests; a reasonably intelligent farmer. I do not remember about a prior entry by Mr. Carraher of this land as a timber claim. I think probably I knew something about the history of it.

Redirect examination:

When I say Mr. Carraher was possessed of about half a section of land I do not fix any particular date.

Cross-examination:

Q. The depositions say that he owned 1000 acres at the time of his death?

A. The time I was speaking about was earlier than any of these. I knew about that. I think there was a letter stating the application had been mislaid, and I forwarded another.

Plaintiff offers in evidence Exhibit "K;" said Exhibit "K" shows
the location of Sioux City & Pacific Railroad to extend diago-
27 nal through Section 1 in question entering said section near
the northeast corner and leaving the same near the northwest corner thereof. Defendant objects as incompetent, immaterial and irrelevant.

Admission.

It is stipulated and agreed that the line of road referred to in the pleadings in this case was completed in accordance with the Acts of Congress and the Legislature of Iowa by the first day of January, 1872, and that the said road is now operated by the Illinois Central Railroad Company.

Defendant, however, does not admit that the final location of the road was in accordance with Exhibit "K."

J. S. McSPARREN, duly sworn, testified: My name is J. S. McSparren; I am deputy county auditor in this county. Have held that position six or seven years, continuously. I have charge of the maps and other documents filed in the office of the county auditor by railroad companies, as required by the Acts of the Legislature of the State of Iowa. I have in my possession a map of the line of railroad of the Illinois Central Railroad Company in Woodbury County, Iowa, filed by said road in the office of the county auditor in accordance with section 1337 of the Code of Iowa. (Produced and marked Exhibit "L."). Plaintiff offers in evidence Exhibit "L." Defendant objects as incompetent, immaterial, irrelevant. This came to us through the mail from J. C. Welling, president of the Illinois Central Railroad Co. and the Dubuque & Sioux City Railroad.

Plaintiff rests.

Defendant's Testimony.

Defendant offers and reads in evidence deposition of Samuel S. Burdett, as follows:

28 My name is Samuel S. Burdett; age 67 years. Profession, attorney at law, having an office at Washington, D. C. I have

been, and continue to be an attorney for the defendant, Iowa Railroad Land Company; that relation began early in 1888 as to some matters, and as to the land grant involved in this suit began in the month of June, 1888. My own and my firm's special duties and employment have been to forward the interests of Iowa Railroad Land Company in all matters pending before the Commissioner of the General Land Office and Secretary of the Interior.

I was Commissioner of the General Land Office during the years 1875 and 1876. I have attached as Exhibit "A" to my deposition copies duly certified under the seal of the General Land Office, of the original documents relating to the N. E. ¼ of the N. E. ¼, section one, township 89, range 43, Woodbury County, Iowa, showing the cause of delay in the Land Office incurred by defendant in procuring said title to be certified. It appears from the proper records that the defendant and its predecessors in interest under the grant, in December, 1858, procured the listing, under the regulations then in force in the Land Department, of the whole of section 1, township 89, range 46, Iowa, for the benefit of the Dubuque & Pacific, afterwards the Iowa Falls & Sioux City Railroad grant, under Act of Congress passed May 15, 1856, the land in said section being, by said list, certified to the state of Iowa, under said grant.

Afterwards, on February 21, 1859, the State of Iowa selected the east half of said section under the Swamp Land Grant, thus conflicting with the aforesaid certified list. Under the order of the Secretary of the Interior, dated February 28, 1859, because of said conflict the said east half of said Section 1 was stricken out of said certified list,
with a view to determining whether it passed to the state under
29 the Swamp Land Grant. These facts are learned from an inspection of the records of the General Land Office. Document No. 7, the letter of Commissioner McFarland, on page two, recites the fact that the records show that the tract in dispute was selected as swamp in February, 1859, and that the claim of the state under said selection was finally rejected February 16, 1878. It also says: "It was also selected under the railroad grant, but was not included in the lists approved to the State because of conflict with the swamp claim."

Said letter (Document No. 7) also shows that John Carraher made application to the local land office at Des Moines, Iowa, to make timber culture entry of the N. E. ¼ of the N. E. ¼ of Section 1, Township 89, Range 46, and that his application was rejected by these officers, Carraher appealing from their action. The dates of Carraher's application and rejection and of his appeal are not given, but an inspection of the record on file in the General Land Office shows that said application was filed on October 2, 1883, that it was rejected on October 30, 1883, for conflict with the railroad grant, and that Carraher's appeal was filed November 24, 1883; and disposed of December 3, 1883, by the Commissioner affirming the action of the local officers. Thereupon Carraher appealed to the Secretary of the Interior, which appeal was submitted to the Secretary on August 25, 1887. Pending Carraher's appeal the Iowa Falls & Sioux City Ry. Co. on April 24, 1885, filed a list of selections in

the local office at Des Moines, embracing the said N. E. ¼ of the N. E. ¼ of Section 1, in question, as inuring to it under said grant of 1856, which list was accepted by the Register and Receiver and by them certified to the Commissioner of the General Land Office under date May 13, 1885.

Under the rules and practice of the Land Department, then and ever since prevailing, an appeal to the Secretary of the In-
30 terior from a decision of the General Land Office affecting the title to a tract of the public lands operated as a supersedeas divesting the General Land Office of all authority to dispose of such tracts until the Secretary shall have finally disposed of the appeal. The pendency of the appeal of Carraher before the Secretary of the Interior, therefore, prevented any action in the General Land Office upon the said selection of the tract applied for by Carraher. The Secretary reached a decision in the case on June 17, 1891. (See document No. 6.)

One of Carraher's contentions was that the grant in question had been adjudicated in 1863 and fully satisfied. The long delay in the Secretary's office was in part caused by this contention. In the meantime the final adjustment of the grant was in process of adjudication, and was only announced on April 9th, 1891. The adjustment then approved by the Secretary, which found a considerable quantity of land still due under the grant, is evidenced by the letter of the Secretary of the Interior to the Commissioner of the General Land Office dated April 9th, 1891, which is published in Volume 12 of the decisions of the Department of the Interior relating to public lands at page 347.

On June 17, 1891, the Secretary's decision adverse to Carraher's application was announced. In the meantime, as appears by the Commissioner's letter of July 11th, 1891, Document No. 5, Carraher had been allowed by the Register and Receiver, without authority, to make timber culture entry No. 607 of the N. E. ¼ of the N. E. ¼ of Section 1 in question under date May 31st 1888. The Commissioner in said letter which promulgated the Secretary's decision of June 17, 1891, and finally rejected the application of Carraher to make timber culture entry, filed October 2, 1883, also directed the cancellation of his said timber culture entry on the ground that it had been allowed without authority.

On July 15, 1891, my firm advised the Iowa Railroad
31 Land Company of the Commissioner's action of July 11, 1891, in which the Carraher entry had been cancelled and received in reply, the letter thereto attached and marked Exhibit "B" from P. E. Hall, president, dated July 28, 1891, in which he asked that we "take such steps as will result in the tract in question being certified to the State for our benefit."

Thereafter, by personal application by myself and other members of my firm, effort was made to secure the due certification of the land under the grant, resulting in a promise from the proper officials of the General Land Office given on or about October 1, 1891, that the tract would be included in a patent which was then about to be prepared. I find that my firm, on the 1st day of October, 1891,

addressed a letter to P. E. Hall, president of the company, advising him of the said promise; a copy of said letter is hereto attached and marked Exhibit "C."

The duty of certifying the tract rested with the proper officials of the General Land Office, and was in fact a mere clerical duty. No rule required the filing of an application in writing for the certification of lands embraced in a pending selection, and the practice of my firm in such matters was to urge, by personal request, the proper officials of the General Land Office to take up such lists and prepare the necessary certificate for the action of the Commissioner and Secretary. This was what was done with respect to the tract in question here, and our requests in the matter resulted in the promise that the land would be included in a patent such as set out in my firm's letter of that date to P. E. Hall, President, Exhibit "C." In the multitude of business transacted by my firm in the years succeeding the action referred to, it is impossible for me to recollect the details of this particular matter, nor do I recollect the circumstances under which the promise referred to in said letter was given, but that it
32 was made to me or to some member of my firm as a result of urgent requests for proper action, is certain, or the said letter of my firm, of October 1, 1891, Exhibit "C," would not have been written. It was the practice of my firm in all matters in our hands from time to time to call them up by personal application, with a view to securing action. When the certification finally issued on January 22, 1903, it was in response to a personal and urgent request from my firm.

I know of no delay whatever caused by either the Iowa Railroad Land Company or its predecessors in interest, or by any of its agents or attorneys, and certainly none by myself or my firm in securing the final issuance of title by the United States to the tract of land in question. The delay in certifying the said land, after the Secretary's action of June 17, 1891, was wholly due to the want of action by the General Land Office, the Company and its agents having performed every duty in timely manner required by the rules of the Department.

The first cause of delay in final certification of said tract under the aforesaid railroad grant of May 15, 1856, was the selection by the state of Iowa under the swamp land grant of 1850 which was filed February 21, 1859, and embraced said tract, which selection was not finally disposed of by the Land Department until 1878.

The next cause of delay was the appeal of John Carraher from the decision of the Commissioner of the General Land Office dated December 3, 1883, which held for rejection the application of said Carraher filed October 2, 1883, to make entry of said tract under the provision of the timber culture law. Delay was next caused by the loss of Carraher's application papers in the General Land Office, which is mentioned in the letter of the Commissioner to Mr. Van Deventer dated September 6, 1887, Doc. No. 1 of this deposition, and in that of the Commissioner to Geo. W. Wakefield, Esq., Doc.
33 No. 4 of this deposition. The Next cause of delay appears to have grown out of the contention made in behalf of Carra-

her in support of his appeal, that the railroad grant had been fully satisfied, and that this tract was not needed to fill up the quota of lands due under the grant. This made necessary the adjustment of the grant which took place on April 9, 1891, as already detailed.

Thereafter the Secretary disposed of Carraher's appeal on June 17, 1891. The delay in certifying the land under the grant which subsequently ensued, occurred in the General Land Office. As to the causes of this last delay I have no certain knowledge, but I can state it as a fact, that between the date of the Secretary's final decision on the Carraher application, down to a very recent date, the railroad division of the General Land Office has been overburdened with work consequent upon the duty of adjusting all of the railroad land grants made by Congress in aid of railroads, which was cast upon the Land Department by the provisions of the Act of March 3, 1887, 24 Stats. at Large p. 556. For most of the time during that period the force of clerks in that division was insufficient to promptly perform the necessary labor attendant upon such adjustments and the conveyance of lands under the grants. The Delay in certifying the tract in question may have been due to these conditions.

The documents referred to by me in this interrogatory have been attached as Exhibit "A."

Attached to the deposition of Samuel S. Burdett, as Exhibit "A" thereof, were the following documents, duly authenticated, as true and literal exemplifications from the originals on file and of record in the General Land Office under date of April 23, 1903, which said documents were read in evidence on behalf of defendant, as follows:

Letter of Acting Commissioner.

34 "WASHINGTON, D. C., *Sept.* 6, 1887.

J. Van Deventer, Esq., Cedar Rapids, Iowa.

SIR: I am in receipt of your letter of the 27th ult., relative to the case of John Carraher *vs.* Iowa Falls & Sioux City R. R. Co., involving the N. E. ¼ N. E. ¼, Sec. 1, T. 89, R. 46, Des Moines, Iowa, requesting to know the ground upon which Carraher's appeal from office decision of Dec. 3, 1883, was allowed. In reply I have to advise you that the appeal referred to was filed within the sixty days allowed for that purpose, but was mislaid, and the papers in the case were not, therefore, submitted for the consideration of the Hon. Secretary of the Interior until the 25th ult. Enclosed herewith, please find copy of the Rules of Practice.

Very respectfully, S. M. STOCKSLAGER,
Acting Commissioner."

Letter of J. Van Deventer.

"OFFICE OF THE IOWA RAILROAD LAND COMPANY,
CEDAR RAPIDS, IOWA, *Aug.* 27, 1887.

Hon. Wm. A. J. Parks, Commissioner of the Gen. Land Office, Washington, D. C.

DEAR SIR: I am in receipt of communication "letter F" No. 6–5006 of date 25th inst., referring to office decision of December 3rd, 1883, in case of John Carraher *vs.* Iowa Falls & Sioux City Railroad Company, wherein Carraher's application to enter under the timber culture laws N. E. ¼ N. E. ¼ of Sec. 1, T. 89 N., Range 46, Des Moines, Iowa, was rejected; and also advising me that the Assistant Commissioner of the General Land Office (Hon. S. M. Stockslager) had submitted on the 25th the papers in the case on appeal by Carraher to the Secretary of the Interior for his examination. The Iowa Railroad Land Company now holds all the interest of the Iowa Falls & Sioux City Railroad Company to the tract in
35 question as well as to all the other lands yet to inure under the grant, and I have therefore to request that I may be furnished with a copy of the appeal papers in this case and be advised within what time we must answer the appeal under the rules of the Department. I also desire to know the ground upon which the appeal is now allowed as by reference to the decision of Dec. 3rd, 1883, you will notice that 60 days was allowed for that purpose, which period elapsed more than three and one-half years ago and in the interim without knowledge of the action of the Department the interest of the Iowa Falls & Sioux City Railroad Company was purchased for a valuable consideration by the Iowa Railroad Land Company.

Very truly yours, J. VAN DEVENTER, *Pres't.*"

Letter of Acting Commissioner.

"WASHINGTON, D. C., *Aug.* 25, 1887.

J. Van Deventer, Esq., Cedar Rapids, Iowa.

SIR: Referring to office decision of Dec. 3, 1883, in the case of John Carraher *vs.* Iowa Falls & Sioux City R. R. Co., wherein Carraher's application to enter, under the timber culture laws, the N. E. ¼ N. E. ¼, Sec. 1, T. 89, R. 46, Des Moines, Iowa, was rejected, I have to advise you that I have this day submitted the papers in the case, on appeal by Carraher, to the Hon. Secretary of the Interior for his consideration.

Very respectfully, S. M. STOCKSLAGER,
Acting Commissioner."

Letter of T. H. Carter.

"DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *July* 11, 1891.

Register and Receiver, Des Moines, Iowa.

SIRS: I enclose herewith a copy of the decision of the Secretary of the Interior of the 17th ultimo, wherein he affirms application of John Carraher to make timber culture entry of the N. E. ¼ N. E. ¼ Sec. 1, T. 89 N., R. 46 W. The application of Carraher is therefore finally rejected and the case closed. It appears that on May 31, 1888, more than three years after the rejection of his application, and while his case was pending before the Secretary of the Interior on appeal, your office allowed Carraher to make timber culture entry 607 of the land. The action was without authority and the entry has this day been cancelled.

36

Respectfully,

T. H. CARTER,
Commissioner."

"DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., *June* 17, 1891.

John Carraher *vs.* Iowa Falls & Sioux City Railroad Co.

The Commissioner of the General Land Office.

SIR: By letter of December 3, 1883, your office affirmed the action of the local office in rejecting the application of John Carraher to make timber culture entry for the N. E. ¼ N. E. ¼, Sec. 1, T. 89, R. 46 W., Des Moines, Iowa, for the reason that said tract had passed to the Iowa Falls & Sioux City, formerly Dubuque & Pacific, Railway Company, under the grant of May 15, 1856. (11 Stats., 9.) Carraher appealed alleging that said tract was excepted from said grant by a certain swamp selection, and further that said grant had been adjudicated in 1863, and fully satisfied, and that therefore said tract could not now be certified for said company. The tract is within the place limits of the grant to said company, the right of which attached on definite location on October 13, 1856. The tract was not selected as swamp land until February 21, 1859, and the selection was rejected on February 26, 1878. It does not appear that any adverse claim existed at date of definite location of the road and the tract consequently passed to the company under its grant.

This being so, th Department is without authority to dispose of it to another. If the Department has certified an excess of lands for the company, that fact might furnish a basis for suit to recover the title to such excess, but would not authorize the disposition to a stranger of a tract, the title to which passed by said act. On the contrary, however, it appears by a report of the Commissioner of the General Land Office, dated September 23, 1889, submitting to the Department an adjustment of the grant for said Dubuque & Pacific Railroad, that there is due as indemnity to said

37

company a balance of 51,824.81 acres on the main line, and 21,102.95 acres on the branch. Dubuque & Pacific R. R. Co. (12 L. D., 347). Said decision is accordingly affirmed. Herewith are returned the papers.

Very respectfully, GEO. CHANDLER,
Acting Secretary."

"DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *Dec.* 3, 1883.

Register and Receiver, Des Moines, Iowa.

GENTLEMEN: I have considered the appeal of John Carraher from your decision rejecting his application to enter under the timber culture law, the N. E. ¼, N. E. ¼, 1-89-46, W. The tract is within the six mile or primary limits of the grant to the state by Act of May 15, 1856 (11 Stats. 6) for the Dubuque & Sioux City Railroad. The right of the road under said grant has heretofore been held to have attached from date of survey in the field. The line of the road opposite the track now in question was surveyed July 7, 1856. The United States Supreme Court, however, in the case Van Wyck *vs.* Knevals (16 Otto 360) held that the right of the state of Kansas under a similar railroad grant, attached when the route of the road was definitely fixed, beyond the power of change by the railroad company, so as to affect the grant, and that this was not done until the route had been adopted by the company
38 and a map designating it had been filed with and accepted by the Secretary of the Interior. The Dubuque & Pacific railroad company filed in this department a map showing the general location of its road, on October 11, and the same was accepted by letter of October 13, 1856. Said map has since been used as a basis for the adjustment of the grant, and the right of the state and the company will, accordingly, hereafter, be held to have attached along the entire road, October 13, 1856. The records show that the tract in dispute was selected as swamp February 21, 1859, and that the claim of the state under said selection was finally rejected on February 26, 1878. It was, also, selected under the railroad grant but was not included in the lists approved to the state because of conflict with the swamp claim. The tract is, also, within the ten mile limits of the grant of the state by act of May 12, 1864 (13 Stats., 72), for the Sioux City & St. Paul Railroad Company, but said company's claim was rejected October 2, 1879, but it took no appeal.

As shown by the facts above recited the tract was vacant public land, at the date the grant for the Dubuque & Pacific Railroad Company took effect, October 13, 1856, and it passed thereunder. It is not subject to appropriation under the laws of the United States, and the application of Carraher is therefore rejected, subject to appeal within sixty days. You will so advise him. The attorney for the railroad company will be advised by this office.

Very respectfully, N. C. McFARLAND,
Commissioner."

Attached to the deposition of Samuel S. Burdett, as Exhibit "B" thereof was the following:

"CEDAR RAPIDS, IOWA, *July* 28, 1891.

Messrs. Curtis & Burdett, P. O. Box 396, Washington, D. C.

GENTLEMEN: Referring to yours of July 15, 1891, in
39 which you advise that the timber culture entry of John Carraher for the N. E. ¼ N. E. ¼, Sec. 1, Twp. 89, R. 46, Iowa, has been cancelled by the Secretary of the Interior on account of conflict with the grant to the state of Iowa for the benefit of the Dubuque & Pacific R'y (now Iowa Falls & Sioux City Railroad), I have to say that this tract was selected by the Iowa Falls & Sioux City R. R. Co. as indemnity January 19, 1884, and again April 24, 1885. As this grant has been adjusted and shows more lands due to the state under the grant, I will thank you to take such steps as will result in the tract in question being certified to the state for our benefit.

Very truly yours, P. E. HALL,
President."

Attached to the deposition of Samuel S. Burdett, as Exhibit "C" thereof, was the following:

WASHINGTON, D. C., *October* 1, 1891.

P. E. Hall, Cedar Rapids, Iowa.

DEAR SIR: Referring to your letter of July 28th last concerning the timber culture entry of John Carraher for N. E. ¼ N. E. ¼ of Section 1, 89, 46, we have now to inform you that we are promised the tract will be included in a patent under the Railroad grant, which is about to be prepared.

Yours truly, CURTIS & BURDETT."

Attached to said deposition of Samuel S. Burdett, as a part of Exhibit "A," was a supplemental selection of lands by the Iowa Falls & Sioux City Railroad Company as follows:

"United States Land Office, Des Moines, Iowa. The Iowa Falls & Sioux City Railroad supplemental list of lands selected under and by virtue of an act of congress entitled, 'An Act Making a Grant of Lands to the State of Iowa to aid in the Construction of certain Railroads in said State, approved May 15, 1856,' and an act of
40 Congress approved March 2, 1868, extending the time for the completion of the Dubuque & Sioux City Railroad Company, and under and in pursuance of the rules and regulations prescribed by the Commissioner of the General Land Office, hereby makes and files the following list of selections of public lands claimed by the said Company as inuring to it and to which it is entitled under and by virtue of the grant and provisions of said acts of Congress, and the location of the line of route of the railroad of said Company, the selection being particularly described as follows: 'N. E. ¼ N. E. ¼, 1-89-46,' and other lands aggregating 73.54."

The said selection was endorsed "Noted in Selection Docket, page

55." Attached thereto was the affidavit of N. D. Parkhurst, to the effect that he was the land agent of the Iowa Falls & Sioux City Railroad Company; that the foregoing list of lands is the correct list of lands claimed by said Company as inuring to it in the construction of the railroad from Iowa Falls to Sioux City for which grant of lands was made by the act of Congress approved May 15, 1856, and an act of Congress approved March 2, 1868; said lands are vacant, unappropriated, and are not interdicted, mineral or reserve lands, and are of the character contemplated by the grant, being within the limits of said grant. Said affidavit was duly sworn to before a Notary Public July 22, 1885.

Attached to said selection is also the certificate of F. G. Clark, Register, and H. H. Griffiths, Receiver, of the United States Land Office, Des Moines, Iowa, under date May 13, 1885, that they have carefully and accurately examined said list of lands and tested the accuracy by plats and records of their office and find the same correct, and certify that the filing of said list is allowed and approved; that said lands are surveyed public lands of the United States within the twenty-mile limit on each side of the route of said railroad; that no part thereof is returned or denominated mineral lands, nor
41 claimed as swamp land, nor is there any homestead redemption, state, or other valid claim to any portion of said lands on file or recorded in this office; that the fees allowed by law for the selection have been paid, and that the full amount of lands so selected aggregate 73.54 acres.

Attached to said deposition as a further part of said Exhibit "A" was the following letter,—

"DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *June* 9, 1886.

Geo. W. Wakefield, Esq., Sioux City, Iowa.

SIR: In reply to your letter of April 23rd ult., you are advised that the original application papers of John Carraher dated November 24, 1883, have been mislaid and after diligent search can not be found. If you will forward a new application to take the place of the original, immediately upon its receipt proper action will be taken upon Carraher's appeal.

Very respectfully, S. M. STOCKSLAGER,
Ass't Commissioner."

And the letters and documents attached to the deposition of Samuel S. Burdett as Exhibit "A" thereof are certified and authenticated under date of April 23, 1903, by J. H. Fimple, Acting Commissioner of the General Land Office of the United States under seal of office as copies of letters and papers relating to the selection of the N. E., N. E., Section 1, T. 89 N., R. 46 W. 5th P. M., Iowa, by the Iowa Falls & Sioux City Railroad Company, and the application of John Carraher to make timber culture entry of said tract, and as true and literal exemplifications from the originals on file and of record in this office.

The defendant further introduced as Exhibit No. 1 a certified copy of certified list No. 48, certified by the Land Commis-
42 sioner of the United States, Binger Hermann, under date of January 20, 1903, approved by E. A. Hitchcock, Secretary of the Interior, January 22, 1903. Said list is entitled: "Iowa Falls & Sioux City Railroad List No. 48; list of lands in the district of lands subject to sale at Des Moines within the six mile limits granted to the State of Iowa by the Act of Congress approved the 15th day of May, 1856, entitled 'An Act making a grant of lands to the State of Iowa in alternate sections to aid in the construction of certain railroads in said state, being the vacant and unappropriated lands in the alternate sections designated by off numbers for six sections in width on each side of the railroad in the City of Dubuque to a point on the Missouri river near Sioux City, with a branch from the mouth of the Tete des Morts to the nearest point on said road; said list consists solely of N. E., N. E., Section 1, Township 89, N., Range 46 W., amounting to 33.54 acres."

Attached to said list are the following certificates:

"N. E. ¼, N. E. ¼, Section 1, Twp. 89 N., Range 46 W., 33.54 acres.

RAILROAD DIVISION, *January* 10, 1903.

We hereby certify that we have examined the foregoing list in connection with the plats and records of this office and have found the tract therein described to fall within the primary limits of the grant to aid in the construction of the Iowa Falls & Sioux City Railroad and to be free from adverse claims and subject to approval to said company under the Act of May 15, 1856.

F. C. LORD,
R. J. McELROY,
Examiners.

Approved:
S. S. MARR,
Chief of Division.

MINERAL DIVISION, *January* 15, 1903.

This certifies that the tracts selected herein are not within
43 six miles of mining claims of record in this office.

C. A. HILLINGSWORTH, *Examiner.*

Approved:
H. G. POTTER,
Chief of Division."

GENERAL LAND OFFICE,
DIVISION OF SWAMP LANDS.
WASHINGTON, D. C., *January* 17, 1903.

This certifies that the foregoing list, List No. 48, Iowa Falls & Sioux City Railroad Company lands, embracing 33.54 acres, has been

carefully examined in connection with the swamp land records of this office, and that the same has been found to be free from conflict.

SAM'L W. SNOW, *Examiner.*

Approved:

EDMUND MALLET,
Chief of Division."

"GENERAL LAND OFFICE, *January* 20, 1903.

I, Binger Hermann, Commissioner of the General Land Office, do hereby certify that the foregoing on page one is a true and correct list of a tract of land within the six mile limits granted to the State of Iowa by the Act of Congress approved the fifteenth day of May, 1856, entitled 'An Act making a grant of lands to the State of Iowa in alternate sections to aid in the construction of certain railroads in said State,' being the vacant and unappropriated lands in the alternate sections designated by odd numbers for six sections in width on each side of the railroad, 'from the city of Dubuque to a point on the Missouri river near Sioux City, with a branch from the mouth of the Tete des Morts to the nearest point on said road,' known as the Iowa Falls & Sioux City Railroad, containing thirty-three acres and fifty-four hundredths of an acre, within the State of Iowa, and they are now submitted for the approval of the
44 Secretary of the Interior in accordance with the requirements of said Act of May 15, 1856, subject to all its conditions, and to any valid interfering rights which may exist to any of the tracts embraced in the foregoing list.

In testimony whereof, I have hereunto subscribed my name and caused the Seal of the General Land Office to be affixed at the city of Washington on the day and year first herein written.

[SEAL.] BINGER HERMANN,
S. S. M., *Commissioner.*

J. I. P. Department of the Interior, Washington, D. C., January 22, 1903.

Approved subject to the conditions and rights above mentioned, covering thirty-three acres and fifty-four hundredths of an acre.

E. A. HITCHCOCK, *Secretary.*"

Said certificate is endorsed:

"STATE OF IOWA, *Woodbury County, ss:*

Entered for taxation this 2nd day of February, 1903.

N. JENNESS, *Auditor.*
W. L. EGAN, *Deputy.*"

"STATE OF IOWA, *Woodbury County, ss:*

Filed for record this 2nd day of February, 1903, at 4:00 o'clock p. m. Recorded in Book 54 Land, page 214.

H. S. BECKER, *Recorder.*
C. A. OLESON, *Deputy.*"

Defendant also offered in evidence as Exhibit No. 2 a patent from the State of Iowa to the Iowa Falls & Sioux City Railroad Company, as follows:

EXHIBIT 2.

The State of Iowa to all to whom these presents shall come, Greeting:

45 Whereas, Chapter 124 of the Acts of the 12th General Assembly of the State of Iowa, provides for patenting to the Iowa Falls and Sioux City Railroad Company certain lands granted by Act of Congress, approved May 15th, 1856, upon compliance by said Company with the conditions of said Act of the General Assembly,

And Whereas, The said Railroad Company, in virtue of a compliance with the conditions imposed by said Act of the General Assembly, is entitled to a conveyance of the following described lands situate in Woodbury County, Iowa, and which have been approved and certified to the State under said Act of Congress, to-wit:

The North East quarter of the North East quarter of Section One (1), Township Eighty-nine (89), North of Range Forty-six (46), West of the Fifth (5th) Principal Meridian. Containing Thirty-three and fifty-four hundredths (33.54) of an acre according to Government survey.

Now Therefore, I, Albert B. Cummins, Governor of the State of Iowa, in consideration of the premises and in conformity with the aforesaid Act of the General Assembly, do hereby convey unto the said Iowa Falls & Sioux City Railroad Company and to their assigns, the tracts of land heretofore described, to have and to hold the same, together with all the rights, privileges, immunities, and appurtenances of whatsoever nature thereunto belonging, unto the said Iowa Falls and Sioux City Railroad Company and their assigns forever.

In Testimony whereof, I, Albert B. Cummins, Governor of the State of Iowa, have caused these letters to be made patent, and the Great Seal of the State of Iowa to be hereunto affixed.

Given under my hand at Des Moines, the second day of February, in the year of our Lord one thousand nine hundred and three and of the State of Iowa the fifty-seventh.

ALBERT B. CUMMINS.

46 By the Governor:
W. B. MARTIN,
Secretary of State,
By C. A. HITES, *Deputy.*

I certify that the foregoing deed is recorded in Vol. 3, page 61.
W. B. MARTIN,
Secretary of State,
[SEAL.] By D. A. HITES, *Deputy.*

Said patent is endorsed "Entered for taxation 10th day of February, 1903. N. Jenness, Auditor." Also endorsed "State of Iowa,

Woodbury County; Filed for record this 10th day of February, 1903, one o'clock p. m., recorded in book 54, Lands, page 219. H. S. Becker, Recorder."

Defendant also offered in evidence as Exhibit No. 3 a certain indenture and deed made and executed 28th day of March, 1887, between the Iowa Falls & Sioux City Railroad Company, and the Iowa Railroad Land Company, whereby said Railroad Company, for a consideration, receipt whereof is hereby acknowledged, bargained and sold and assigned to the Iowa Railroad Land Company all and singular the rights and interest of said Railroad Company in and to all its remaining lands and interests in lands in the State of Iowa expressly including in such bargain and sale all its rights, title, interest, claims, and demands remaining unadjusted and unsatisfied in and to its land grant from the United States inuring under and by virtue of an act of Congress approved May 15th, 1856, entitled, "An act making a grant of lands to the state of Iowa in alternate sections," etc.

Said indenture was duly executed and acknowledged by the said Railroad Company in manner and form provided by law, and was endorsed as follows:

47 "STATE OF IOWA, *Woodbury County, ss:*

Filed for record this 27th day of February, A. D., 1889, 1:30 o'clock p. m., and recorded in Book 35, Lands, page 254.

C. A. DEMUN, *Recorder.*"

Defendant further introduced as Exhibit No. 4 a transcript of the Tract Book of said United States Land Office at Des Moines, Iowa, so far as it relates to timber culture entry No. 607 of John Carraher, being the entry of the tract in question. This exhibit also shows said entries July 11, 1891.

Defendant also introduced as Exhibit 5 a transcript of the register of timber culture entries in the United States Land Office at Des Moines, Iowa, showing that John Carraher's application to enter the tract in question under the Act of March 3, 1873, was made May 31, 1888, and cancelled July 11, 1891.

Exhibits 4 and 5 are each certified as true and literal transcripts of the records in question by Thornton S. Howard, Register, of the United States Land Office of Des Moines, Iowa.

Exhibit "K" offered by plaintiff consists of a map duly authenticated under date April 3, 1903, Commissioner of the General Land Office of the United States under his seal as a copy of so much of the map of definite location of the Dubuque & Pacific Railroad, filed October 13, 1856, in this office, as relates to that part thereof in T. 89, N. R. 47, W., Iowa, and as being a true and literal exemplification from the original on file in said office.

Said map shows said railroad as extending diagonally through the land in question, entering near the northeast corner and leaving said land about twenty rods east of the northwest corner thereof.

Attached to said map but in no manner identified by the certifi-

cate of said Commissioner, or otherwise, is a copy of what
48 purports to be a certificate by S. P. Farley, President of the Dubuque & Pacific Railroad Company, and attested by H. P. Leach, as Secretary of said Company; also signed by B. B. Provoost, Commissioner. Said certificate is dated, "Dubuque, September 27, 1856," and certifies that "this map shows the location of the line and route of the Dubuque & Pacific Railroad in the city of Dubuque to a point on the Missouri river at Sioux City as definitely fixed in compliance with the Act of Congress entitled "An Act making a grant of lands to the State of Iowa in alternate sections to aid in the construction of certain railroads in said state," approved May 15, 1856, and in pursuance of a resolution of the Board of Directors of said Railroad Company, passed on the 26th day of May, 1856; directing B. B. Provoost, Chief Engineer, to locate and definitely fix said route.

Attached also to said exhibit is a copy of what purports to be a certificate of Jas. W. Grimes, Governor of the State of Iowa, under date of October 2, 1856; "that this plat or map of the Dubuque & Pacific Railroad Company has been filed in my office by the President of the Dubuque & Pacific Railroad Company, and shows the location of the line and route of said road and branches as definitely fixed by said Company in compliance with the Act of Congress approved May 15, 1868, an "Act making a grant of land to the State of Iowa in alternate sections to aid in the construction of certain railroads in said State" and with an Act of the Legislative Assembly of the State of Iowa approved July 14, 1856, entitled "An Act to accept of and carry into effect the trust conferred upon the State of Iowa by an Act of Congress entitled 'An Act making a grant of land to the State of Iowa in alternate sections to aid in the construction of certain railroads in said State, approved May 15, 1856.'"

Exhibit "H" introduced by plaintiff is a lease of his premises in question for the year 1900 from John Carraher to W. R. Reid.

49 Exhibit "L" introduced by plaintiff shows the location of the Illinois Central Railroad Company to be diagonally through the land in question entering near the northeast corner and leaving the same east of the southwest corner thereof.

Exhibit "M" offered by plaintiff is as follows:

EXHIBIT "M."

Office of the Iowa Railroad Land Company.

CEDAR RAPIDS, IOWA, *Aug. 18th*, 1902.

Messrs. Lohr, Gardiner & Lohr, Sioux City, Iowa.

GENTLEMEN: Replying to your favor of Aug. 15th, I beg leave to inform you that the Iowa Railroad Land Company makes no claim to the tract of land described by you, viz.: N. E. ¼ N. E. ¼ of Section 1, Township 89, Range 46, Woodbury Co., Iowa.

Owing to the history of the land grant originally made to the State of Iowa for a line of road from Dubuque to Sioux City, and all

subsequent transactions and peculiar legislation relating thereto, I do not think that a relinquishment from this company would do you any good, but I think if you write the Commissioner of the General Land Office, you will find that the land grant in question has been fully adjusted and the account closed, and that as to all such lands as was not certified to the state for the construction of the railroad aforesaid, that the claims of the state are barred, and that the land would be subject to disposal under the general land laws of the United States, as they may apply to such tracts as the one above referred to is.

Very truly yours, P. E. HALL, *President.*

Exhibit "N," introduced by plaintiff, is as follows:

50 EXHIBIT "N."

Office of the Iowa Railroad Land Company.

CEDAR RAPIDS, IOWA, *Aug. 20th,* 1902.

Messrs. Lohr, Gardiner & Lohr, Sioux City, Iowa.

GENTLEMEN: I have yours of Aug. 19th further in regard to the N. E., N. E. 1-89-46. The Iowa Railroad Land Company succeeded to all the rights of the Iowa Falls & Sioux City Railroad Co., both as to lands certified under the grant, or any claims for grants which the railroad company might have on account of the construction of the road. We do not find that the tract in question had ever been certified to the state, and believing that four or five years ago this entire grant from Dubuque to Sioux City had been fully adjusted, and the account closed, I wrote you as I did —that the Iowa Railroad Land Co. made no claim to this tract. I was quite positive that this grant had been fully adjusted, and feel so now, but when I come to look on our files for papers showing this to be the fact, I do not find them, and it may be that I am mistaken. Whatever rights the Iowa Falls & Sioux City Company may have in the matter would be vested in this company. I will write to our attorneys in Washington and find what the situation is as to the adjustment of the grant, and then can tell you whether we make any claim to the land or not. The difficulty with your client is that it would appear that the title to this tract is still in the United States, against whom you cannot bring any suit, and even if you had our quit-claim your land would be likely to be entered by some scrip holder or jumped by some homesteader. If the facts be as stated in your letter—of which I have no doubt- Mr. Carraher never had any title to the land, and therefore could not convey it to your client. I will write you further about this when we can get more difinite information.

Very truly yours, P. E. HALL, *President.*

51 Exhibit "O," introduced by plaintiff is as follows:

EXHIBIT "O."

"Office of the Iowa Railroad Land Company.

CEDAR RAPIDS, IOWA, *Aug.* 26, 1902.

Messrs. Lohr, Gardiner & Lohr, Sioux City, Iowa.

GENTLEMEN: In the matter of the N. E., N. E., 1-89-46, from investigation made in the United States General Land Office at Washington, I find that there was a final accounting as to the lands owned by the Dubuque & Sioux City Company east of Range 36, but no final settlement as to the lands west of that point. It was this final settlement with the Dubuque & Sioux City Railroad Co. that misled me when I wrote you that this company had no claim on the N. E., N. E. of 1. I am advised that there is still a deficiency in the grant for the western portion of the road, so that whatever claim might have been made by the Iowa Falls & Sioux City Railroad Co. can now be made by this company, and we will have the matter taken up at once.

Very truly yours, P. E. HALL, *President.*"

Exhibits "M," "N" and "O" were each objected to separately by defendant as being incompetent immaterial and irrelevant.

And the foregoing was all of the evidence offered or introduced by either party on said trial; which said evidence was under date of November 9, 1904, duly certified by the presiding Judge, as being all of the evidence as aforesaid, and said evidence and certificate was duly filed in said cause November 10, 1904.

That thereupon, after due argument, said cause was taken under advisement by said Court, and that thereafter, on or about the 29th day of June, 1904, said Court made and entered of record its

52 *Final Decree*

in said cause, finding in favor of plaintiff and against defendant on the issues joined, and decreeing that plaintiff have the relief prayed for in his petition, and that his title be quieted as against all adverse claims of defendant and all persons claiming said premises or any part thereof through or under defendant; that plaintiff be declared and adjudged to be the true and lawful owner of the land in question, to-wit: the N. E. ¼ of the N. E. ¼ of Section 1, Township 89 North, Range 46 West, in Woodbury County, Iowa; and that defendant be forever barred and estopped from having or claiming any right or title to said premises adverse to plaintiff. That defendant's supplementary answer and counterclaim be dismissed, and that plaintiff have and recover his costs of this action. To all of the foregoing decree the Iowa Railroad Land Company at the time duly excepted, and its exceptions were incorporated in said decree.

That thereafter, on or about the 21st day of July, 1904, the defendant, Iowa Railroad Land Company, duly perfected its

Appeal

from said judgment to the Supreme Court of Iowa by serving on plaintiff, Claud F. Blumer, and on the Clerk of the District Court of Woodbury County, Iowa, a notice of appeal in due form as provided by law, and by causing the same to be filed in said cause.

CHAS. A. CLARK & SON,
WM. G. CLARK,
Attorneys for Appellant.

The actual cost of printing the foregoing abstract, to appellant, is $54.00.

CHAS. A. CLARK & SON,
WM. G. CLARK,
Attorneys for Appellant.

53 In the Supreme Court of Iowa, January Term, 1905. In Equity.

CLAUDE F. BLUMER, Appellee,
vs.
IOWA RAILROAD LAND COMPANY, Appellant.

Appeal from Woodbury District Court.

Hon. J. F. Oliver, Judge.

Lohr, Gardiner & Lohr, Attorneys for Appellee.
Chas. A .Clark, & Son, Wm. G. Clark, Attorneys for Appellant.

Due legal and timely service of Appellee's Amendment to Abstract is hereby accepted and copies received this — day of January, 1905.

—— ——,
Attorneys for Appellant.

Appellee's Amendment to Abstract.

Appellee denies the correctness and completeness of appellant's abstract filed in this case, and for the purpose of supply-
54 ing omissions and correcting errors and defects therein, the following amendment to the abstract is submitted and filed by appellee. And the original abstract filed herein, together with this amendment thereto, constitute a full and complete abstract of the record and contain everything that appears of record in this cause.

In line 14, page 9, "1904" should be *1903*.

After line 9 page 11, insert the following:

Thereafter, on May 28th, 1903, plaintiff filed in said cause the following

Motion.

Now comes the plaintiff in the above cause and moves the court to strike from the files the supplemental answer and counter-claim of the defendant filed May 28th, 1903, for the following reasons:

1. That the same was not filed with or at the same time as the answer, and introduces new issues into the case.

2. That it was not filed with leave of court first had and obtained.

3. That it is inconsistent with the original answer which denied any interest of the defendant in and to the real estate in controversy, and alleged the title thereto to be in the United States, and sets up a title acquired subsequent to plaintiff's title and since the beginning of this suit.

Which motion was by the court overruled and defendant given leave to file its supplemental answer and counter-claim, to which ruling the plaintiff duly excepted.

After the word "plaintiff" at the beginning of line 13, page 12, insert: *offered and.*

In line 9 of page 13, "1898" should be *1888.*

55 After "also" in the second line from the bottom of page 14 insert, *offered and.*

After "also" in line 11, page 15th, insert, *offered and.*

In line 9 from the bottom of page 15, "I" should read *Rentle.*

After "further," line 12, page 16, insert, *offered and.*

After "township," line 19, page 16, insert: "It is the northeast forty of the township. I and my brother rented from old man Carraher."

After "rent," in line 23, page 16, insert: "We rented it in partnership."

After "also," line 7, page 22, insert, *offered in evidence and.*

At the close of line 6, page 24, insert:

Exhibit "A" attached to the depositions of plaintiff is as follows:

[4–142.]

Timber Culture.

Receiver's Receipt No. 607. Application No. 607.

RECEIVER'S OFFICE, DES MOINES, IOWA, *May 31st,* 1888.

Received of John Carraher the sum of Nine Dollars — cents, being the amount of fee and compensation of Register and Receiver for the entry of North East — of N. E. quarter of Section one in township 89 of range 46, under the first section of the act of Congress approved June 14th, 1878, entitled "An act to amend an act entitled an act to encourage the growth of timber on the Western Prairies."

$9.00. M. V. McHENRY, *Receiver.*

56 Endorsed: State of Iowa, Woodbury County. Filed for record this 9 day of Dec. 1891 at 2 o'clock p. m., and recorded in Book 40 Lands, Page 162. C. A. DeMun, Recorder. P. Shontz, Deputy.

In line 15, page 25, "Exhibit 'A' " should be *Exhibit "J."* Said exhibit is as follows:

Office of Geo. W. Wakefield, District Judge.

Judges 4th Judicial District of Iowa:

C. H. Lewis, Sioux City, Iowa,
Scott M. Ladd, Sheldon, Iowa,
Geo. W. Wakefield, Sioux City, Ia.

Counties.	Terms of Court, A. D. 1888.
Harrison,	Jan. 2, March 19, Aug. 27, Oct. 22.
Monona,	Feb. 6, April 16, Sept. 24, Nov. 19.
Cherokee,	Feb. 27, April 30, Oct. 8, Dec. 3.
Osceola,	Jan. 2, April 16, Aug. 27, Oct. 29.
O'Brien,	Jan. 9, April 23, Sept. 10, Nov. 12.
Sioux,	Jan. 23, May 7, Sept. 24, Nov. 26.
Plymouth,	Feb. 6, May 21, Oct. 8, Dec. 10.
Woodbury,	Jan. 2, Mch. 19, May 21, Aug. 28.
Lyon,	March 5, June 11, Oct. 15, Dec. 10, Oct. 29.

SIOUX CITY, IOWA, *June* 2, 1888.

Mr. John Carraher.

MY DEAR SIR: I have the pleasure of handing you herewith your Timber Culture Entry Receiver's Receipt, No. 607, for N. E. ¼ of N. E. ¼ 1, 89, 46.

Resp'y, GEO. W. WAKEFIELD.

P. S.—You can take possession and proceed to comply with the Timber Culture laws.

At the end of line 2, page 27, "northwest" should be *southwest.*

57 After the third line from the bottom of page 27, insert: The same understanding with reference to objections to the depositions and testimony offered by the defendant is entered into between the parties as was made with reference to the testimony offered by the plaintiff.

After the date, "January 22, 1903," in line 3, page 42, insert: Objected to as incompetent, immaterial and irrelevant.

After the fifth line from the bottom of page 44, insert: Objected to as incompetent, immaterial and irrelevant.

After the word "through," at the beginning of the fifth line from the bottom of page 47, insert: *The township in which is located.* And in the next line "land" should be *township,* and "northwest" should be *southwest.*

After line 2, page 49, insert: *The township in which is located.*

LOHR, GARDINER & LOHR,
Attorneys for Appellee.

We hereby certify that the actual cost of printing this Amendment to Abstract was $3.75.

LOHR, GARDINER & LOHR.

58 Filed Nov. 17th, 1905.

In the Supreme Court of Iowa.

CLAUDE F. BLUMER
vs.
IOWA RAILROAD LAND COMPANY, Appellant.

Appeal from the District Court of Woodbury County, J. F. Oliver, Judge.

Action to Quiet Title. Decree as Prayed, from which the Defendant Appeals.

Lohr, Gardner & Lohr, For Appellee.
Chas. A. Clark & Son, and Wm. G. Clark, For Appellant.

LADD, *J.*:

The forty acres of land in controversy *is* located within the place limits of the grant for the benefit of the Dubuque & Sioux City Railroad Company, afterwards transferred to the Iowa Falls & Sioux City Railroad Company, under the Act of Congress approved May 15, 1856. The road was completed prior to 1872 and, though this track was included in the list certified to the state, approval was delayed by the assertion of title to it under the swamp land act until 1878. In 1883 John Carraher applied to the local land office at Des Moines to enter it under the Timber Culture Act but his application was rejected owing to conflict with the grant to the railroad com-
59 pany and the decision was affirmed by the Commissioner of the General Land Office in December of the same year. He then appealed to the Secretary of Interior by whom the previous decisions were approved June 17, 1891. In the meantime the Company had filed (1885) selections of land, including this, in the local land office, as inuring to it, under the grant, and these were accepted by the Register and Receiver and certified to the Commissioner but, under the practice of the department, could not be passed on until Carraher's appeal had been disposed of and when reached in January, 1893, this land, through oversight or other cause was omitted from the certification to the company. In 1888 Carraher presented a second application for the same land to the register and receiver and procured the following receipt:

"*Timber Culture.*

Receiver's Receipt No. 607. Application No. 607.

RECEIVER'S OFFICE, DES MOINES, IOWA, *May 31st*, 1888.

Received of John Carraher the sum of Nine Dollars — cents, being the amount of fee and compensation of Register and Receiver for the entry of North East — of N. E. quarter of Section One in township 89 of range 46, under the first section of the act of Congress approved June 14th, 1878, entitled "An act to amend an act entitled an act to encourage the growth of timber on the Western prairies.'"

$9.00. M. V. McHENRY, *Receiver.*"

This was forwarded to him by his attorney, accompanied by a letter.

"SIOUX CITY, IOWA, *June* 2, 1888.

Mr. John Carraher.

MY DEAR SIR: I have the pleasure of handing you herewith your timber culture entry Receiver's receipt No. 607 for N. E. ¼ of N. E. ¼, 1, 89, 46.

Respectfully, GEO. W. WAKEFIELD.

P. S.—You can take possession and proceed to comply with the timber culture laws."

He proceeded at once to comply with the timber culture act and was in possession of the land from that time until his death in 1901, since which time plaintiff, to whom Carraher conveyed it a few days before he died, has been in possession. Some question is made as to the character of this possession but, without reviewing the evidence, it is sufficient to say that we think it such as is required to constitute adverse possession provided it shall be construed
60 to have been in good faith and under claim of right or color of title. The defendant acquired whatever interest in the land the railroad company had, or might obtain, in 1887 and the correspondence between the parties indicates that it had overlooked its claim thereto and did not receive paper title until January, 1903. This action was begun Oct. 23, 1902, and the ultimate issue to be determined is whether defendant has lost title through the adverse possession of the plaintiff and his grantors. It is conceded that the grant to the railroad company was *in presenti* and as the company had earned the land and all contests pending before the land department had been disposed of prior to 1892 its ownership for the 10 years preceding the commencement of the action was such as to be subject to the doctrine of adverse possession.

Deseret Salt Co. *vs.* Tarpey, 142 U. S. 241.

Toltec Ranch Co. *vs.* Cook, 91 U. S. 532.

Iowa Railroad Land Co. *vs.* Fehring, 101 N. W. 120 and cases cited.

Some claim is made that this case is distinguishable from those first cited in that before certification in 1903 the land department ascertained that the tract was not within six miles of mineral claims and therefore asserted active jurisdiction in determining whether it was within an exception contained in the grant. This was a mere matter of detail in connection with the certification and did not tend to show that the company had not acquired ownership under the grant thirty years previous or that it might not have obtained the certificate at any time after 1891. On the contrary the investigation resulted in confirming such ownership during this long period. As observed in Borden *vs.* N. P. R. Co., 154 U. S. 288 "the delay of the government in issuing a patent does not effect the power of the company to assert in the meantime, by possessory action, its rights to lands which are in fact non-mineral." This was a direct action by the railroad company to recover the lands under the grant and is not otherwise in point. All held in St. P. M. & M. R. Co. *vs.* Olson, 91 N. W. (Minn.) 204 was that in computing the period of the statute of limitations the time a contest between the parties was pending before the land department of the government should not be
61 excluded. The Act of Congress approved Mar. 3, 1887, providing for the adjustment of railroad grants did not purport to disturb the ownership of lands already earned and moreover there was no showing that any readjustment of this grant was attempted. The case is within the rule of the decisions cited and the defendant's title has been such as to be subject to adverse possession at least since 1891.

II. Counsel for appellant first contend that the possession of Carraher was not in good faith. At the time he filed his last application under the tree culture act the appeal from the rejection of his first application had been pending nearly five years. His second application was received in 1888 and not until three years thereafter did the secretary of the Interior affirm the decisions rejecting the first. At that time the filing of the second application was ordered to be cancelled but whether Carraher was advised of this is not disclosed. Not having been accorded a hearing nor given any previous notice of the department's intention to cancel his entry it is not to be inferred that he was subsequently informed of what had been done. See Wilber *vs.* Ry. Co. 116 Iowa 65 and cases cited. He subdued the soil and undertook to plant and cultivate the trees as required by the Act of Congress and there is no ground for saying that he was not acting in good faith save this knowledge of the adverse decision on his first application in 1891. But he was not claiming under that but by virtue of the receipt which had been obtained in 1888 and under which for all that appears he supposed he might acquire the land. That he was mistaken can make no difference so long as he honestly believed, though mistakenly, that he had the right to acquire the land under the tree culture act. He had the assurance of his attorney who was a judge of the district court when the letter was written and this with the acceptance of his application at the local land office might well have convinced him of such right. The

entire doctrine of adverse possession is based upon the existence of defective titles for where titles are good there is no occasion for invoking it. The case differs from Litchfield *vs.* Sewell, 97 Iowa 247 in that there defendant knew he had no right evidence is
62 that Carraher supposed he had been accorded the right to earn it under the Tree Culture act. See Coleman *vs.* Billings, 89 Ill. 183. Barrett *vs.* Stradt, 41 N. W. (Wis.) 439. Good faith is to be presumed and we think the evidence insufficient to justify a finding to the contrary.

III. The plaintiff's claim of right, for the time required to acquire title under the timber culture act, at least, was subservient to that of the government and since then the period of the statute of limitations, has not run. The controlling question then is whether the statutory period shall be computed from the time possession was taken under the receiver's receipt or from the time he might have so complied with the laws which entitle the applicant to a patent. In other words is the claim of right sufficient if against all save the government or must the claim be that of entire ownership and therefore against the world? The possession of Carraher was taken for the purpose of divesting the government of title by complying with the provisions of the timber culture act, and was necessarily hostile to all others. In effect he conceded ownership by the government which unless he executed his purpose, would continue. It was an admission that the United States rather than himself held the fee and was entitled to retain it for the eight years required by the law for him to earn it. See Act of Congress approved June 14, 1878. His first occupancy was under the second entry, in 1888 at which time the land had been earned by the railroad company and as the grant was *in presenti* it or its grantee could have maintained ejectment against him at any time within the period of limitation. When if ever did this period, which is ten years in this state, begin to run?

If after Carraher might have earned and acquired title under the Timber Culture Act then the period had not expired when this action was begun; if when he entered into possession under the receiver's receipt then it has run and plaintiff's title should be quieted. In Cole *vs.* Des Moines Valley R. Co. 76 Iowa 185 title was quieted in the plaintiff though his entry had been cancelled but he had
63 been in adverse possession more than ten years subsequent to the lapse of time within which he might have earned the homestead. The same is true of Wilber *vs.* C. R. & M. R. R. Co., 116 Iowa 65. The Supreme Court of Nebraska, without deciding that the running of the statute might not begin sooner held, in Carroll *vs.* Patrick. 23 Neb. 1634; 37 N. W 671 that "A land officer's certificate therefore, under our statute is color of title; as between individuals, the statute of limitations begins to run from the time the party entering the land did all that was required of him to perfect his purchase." At such time the claim is that of ownership and apparently all lacking is the paper title. It has ceased to be subservient to and has become adverse to the government. See Chicago R. I. & P. R. Co. *vs.* Allfree, 64 Iowa 500. If in fact earned the government retains but the naked legal title and the claimant has become the real

owner. The land is then segregated from the public domain and has become private property.

Durham *vs.* Hussman, 89 Iowa 29.
Nichols *vs.* Council, 51 Ark. 26; 34 Am. St. 20.
Cavender *vs.* Smith, 56 Am. D. 541.
Cady *vs.* Eigney, 7 N. W. 102.
Steele *vs.* Bley, 22 Bley, 22 P. (Utah) 311.
Worth *vs.* Branson, 98 U. S. 118.
Stark *vs.* Starrs, 6 Well 402.

But it is not essential that the land be actually earned in compliance with the law, it is enough that the party in possession in good faith so believes and asserts claim of ownership against the government as well as all others.

Up to this point we apprehend there can be no controversy although language may be found in some decisions indicating that the legal title must have passed from the government. See Arnold *vs.* Woodward, 14 Col. 164. Gibson *vs.* Chonteau, 80 U. S. 92. But the claim of one who enters land with the purpose of acquiring title from the government by compliance with its laws is quite as hostile as though patent had been issued, to all others though subservient to the government. And the weight of authority is to the effect that the claim of right may be subservient to the government if hostile to all others.

64 Clemens *vs.* Runckel, 34 Mo. 41; 84 Am. D. 69.
Mather *vs.* Walsh, 107 Mo. 121; 17 S. W. 755.
Moore *vs.* Brownfield, 7 Wash. 23; 34 Pac. 199.
Lord *vs.* Sawyer, 57 Cal 65.
Alabama State Land Co. *vs.* Kyle, 13 So. (Ala.) 143.
Francoeur *vs.* New House, 43 Fed. R. 236.
Northern Pac. R. Co. *vs.* Kranich, 52 Fed. R. 911.
See Railway Co. *vs.* Townsend, 84 Minn. 152; 86 N. W. 1007.

The principle is well stated in the first mentioned case: "The defendant, and those under whom he claims, did not enter or hold under the plaintiff. They did not recognize his title. They had no privity with him. They do not appear even to have known of the existence of his title. They recognized a title in another person "the United States," who was supposed to be the proprietors and as to the United States, their possession was not hostile; but they did expect to acquire the title of the United States, believing themselves to have right of presumption to the exclusion of all other persons, and a present right to the use and possession of the land.

The defendant has the actual possession, within the meaning of the statute of limitations, with a claim not of absolute title, but of a right which was adverse to all other persons." The only decision we have discovered to the contrary is Altschul *vs.* O'Neil 35 Ore. 202; 58 Pac. 95. But there the company under which plaintiff held became entitled to the land in 1886 and though defendant had occupied it since 1866 he had made no effort to acquire the land from the government as a homestead until 1894. His application was

then rejected by the officers of the local land office and their decision later confirmed on appeal. Suit was begun in 1898 and the statute of limitations of ten years pleaded in bar. It is manifest that defendant was a mere trespasser throughout. His attitude was entirely different from that of a party whose application has been received by the officers of the government and who has entered into possession in good faith and continues therein in what he supposes to be in conformity with the laws of Congress. Nevertheless the court delivered an opinion exhibiting extended research to the effect that a claim of right upon which adverse possession may be based must be against the whole world including the government.

65 No doubt the judges have made all the statements attributed to them in this opinion but it is to be said in extenuation that each had application to the particular facts of the case in hand and that in none save those the court declined to follow was the question as to whether the fact that the claim was subservient to the government involved. Indeed the character of the claim under a government entry does not appear to have been given due consideration. If effective it is exclusive of others. It is an assertion of right to the land, which, if well founded, must defeat the claims of all others. It involves a right of possession as absolute as though the party owned the title. It purports to exclude everyone from its enjoyment and even as against the government to assert the right to divest its title by compliance with the law. The statute of limitations never runs in favor of or against the government and we are inclined to hold, in harmony with the weight of authority, that the relation of the citizen's claim to the government's title ought not to interfere with the running of the statute against all others, and that the period should be computed from the time Carraher entered into possession under the receiver's receipt.

The decree was right and is affirmed.

66 Supreme Court of Iowa.

STATE OF IOWA, *ss:*

Be it Remembered, That on the 17th day of November A. D. 1905, the following proceedings, among others, were had and entered of Record in the Supreme Court of Iowa, to-wit:

Appeal from Woodbury District Court.

CLAUDE F. BLUMER
vs.
IOWA R. R. LAND COMPANY, Appellant.

In this cause, the court being fully advised in the premises, file their written opinion affirming the judgment of the District Court.

It is therefore considered by the Court that the judgment of the court below be and it is hereby affirmed and that a writ of *procedendo* issue accordingly.

It is further considered by the Court that the appl'nt pay the costs of this appeal, taxed at $35.75 and that execution issue therefor.

I hereby certify that the foregoing is a full, true and complete copy of the Record entry of said Court in the above entitled cause, as full, true and complete as the same remains on file and of record in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the Seal of said Court this 31st day of January A. D. 1906.

[Seal of the Supreme Court of Iowa.]

JNO. C. CROCKETT,
Clerk Supreme Court,
By —— ——, *Deputy.*

67 STATE OF IOWA, *ss:*

I, John C. Crockett, Clerk of the Supreme Court of Iowa, do hereby certify that the foregoing is a true and correct transcript of the record, opinion, and final judgment in a certain cause tried and determined in the Supreme Court of Iowa between Claude F. Blumer, Plaintiff and Appellee, and Iowa Railroad Land Company, Defendant and Appellant, as full, true and complete as the same are of record and on file in my office.

I further certify that the writ of error, citation, and supersedeas bond with the order of approval to operate as a supersedeas endorsed thereon are hereto attached in original form, and that true and correct copies thereof have been retained in my office and this return is made in obedience to said writ of error.

In testimony whereof, witness my signature and the seal of said court at Des Moines, Iowa, this 31st day of January, A. D. 1906.

[Seal of the Supreme Court of Iowa.]

JNO. C. CROCKETT,
Clerk of the Supreme Court of Iowa.

[Endorsed:] Filed Jan. 29, 1906. Jno. C. Crockett, Clerk Supreme Court.

68 In the Supreme Court of the United States.

IOWA RAILROAD LAND COMPANY, Plaintiff in Error,
v.
CLAUDE F. BLUMER, Defendant in Error.

Supersedeas Bond.

Know all men by these presents, That we, The Iowa Railroad Land Company, as principal, and P. E. Hall as surety, are held and firmly bound unto Claude F. Blumer of Woodbury County, Iowa, in the sum of Five Hundred (500.) Dollars, to be paid to the aforesaid Claude F. Blumer, his successors, representatives and assigns, for the payment of which sum well and truly to be made we bind ourselves and each of us and the heirs, executors, and administrators of the said P. E. Hall firmly by these presents.

Witness our signatures hereto this 3d day of January, A. D. 1906.

Whereas the above named Iowa Railroad Land Company has prosecuted a writ of error in the Supreme Court of the United States to reverse the judgment and decree rendered in the above entitled action by the Supreme Court of Iowa in which said court the said Claude F. Blumer was impleaded as plaintiff and appellee, and the said Iowa Railroad Land Company as defendant and appellant.

Now therefore the condition of this obligation is such that if the above named Iowa Railroad Land Company shall prosecute its said writ of error to effect and answer all costs and damages if it shall fail to make good its plea then this obligation shall be void; otherwise to remain in full force and virtue.

IOWA RAILROAD LAND COMPANY,
By WM. G. CLARK, *Its Attorney.*
P. E. HALL, *Surety.*

This bond accepted and approved to operate as a supersedeas and writ allowed this 18 day of January, A. D. 1906.

EMLIN McLAIN,
Justice of the Supreme Court of Iowa.

69 [Endorsed:] Filed Jan. 29, 1906. Jno. C. Crockett, Clerk Supreme Court.

70 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable Judges of the Supreme Court of the State of Iowa, Greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the Supreme Court of the State of Iowa before you, being the highest court of law or equity in said state, in which a decision could be had on said suit between Claude F. Blumer, Plaintiff, and Appellee, and the Iowa Railroad Land Company, Defendant and Appellant, wherein was claimed by the said defendant and appellant certain rights, privileges and immunities, and a certain title under the Constitution and statutes of the United States, and under a commission held and authority exercised under the United States, and the validity and effect of an authority so exercised under the United States and the decision was against the rights, privileges and immunities, and title, and validity and effect of the authority specially set up and claimed under the Constitution and Statutes of the United States as aforesaid, a manifest error hath happened, to the great damage of the said defendant, Iowa Railroad Land Company, plaintiff in error herein, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment therein be given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the

17th day of February next, in the Supreme Court to be then
71 and there held, that, the record and proceedings aforesaid being inspected, the Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, the 18th day of January, A. D. 1906.

[Seal U. S. Circuit Court, Southern District Iowa.]

EDWARD R. MASON,
Clerk United States Circuit Court, Southern District of Iowa.

Allowed:

EMLIN McCLAIN,
Chief Justice of the Supreme Court of the State of Iowa.

Due and legal service of the above writ of error and copy thereof accepted this 26 day of January, A. D. 1906.

LOHR, GARDINER & LOHR,
Attorneys for Defendant.

72 [Endorsed:] Filed Jan. 29, 1906. Jno. C. Crockett, Clerk Supreme Court.

73 UNITED STATES OF AMERICA, *ss:*

The President of the United States to Claude F. Blumer, Defendant in Error:

You are hereby cited and admonished to be and appear within thirty (30) days after this date at a term of the Supreme Court of the United States to be holden at Washington, on the second Monday of October next, pursuant to a writ of error filed in the Clerk's office of the Supreme Court of Iowa, wherein the Iowa Railroad Land Company is plaintiff in error, to show cause if any there be, why the judgment rendered against said plaintiff in error as in said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Emlin McClain, Chief Justice of the Supreme Court of Iowa, this 17th day of January, A. D. 1906.

EMLIN McCLAIN,
Chief Justice of the Supreme Court of Iowa.

Due and legal service of the above citation accepted and copy thereof received this 26 day of January, A. D. 1906.

LOHR, GARDINER & LOHR,
Attorneys for Defendant in Error.

74 [Endorsed:] Filed Jan. 29, 1906. Jno. C. Crockett, Clerk Supreme Court.

Endorsed on cover: File No. 20,098. Iowa Supreme Court. Term No. 207. The Iowa Railroad Land Company, plaintiff in error, *vs.* Claude F. Blumer. Filed February 16th, 1906. File No. 20,098.

FILE COPY.

Office Supreme Court, U. S.
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JAN 29 1907
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1906.

No. 207.

THE IOWA RAILROAD LAND COMPANY,
Plaintiff in Error,

vs.

CLAUDE F. BLUMER.

IN ERROR TO THE SUPREME COURT OF IOWA.

BRIEF FOR PLAINTIFF IN ERROR

BY

CHARLES A. CLARK.

Eastman Bros., Law Printers, 358 Dearborn St., Chicago.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1906.

No. 207.

THE IOWA RAILROAD LAND COMPANY,
Plaintiff in Error,

vs.

CLAUDE F. BLUMER.

IN ERROR TO THE SUPREME COURT OF IOWA.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

This is a suit in equity brought by defendant in error, who was plaintiff in the courts below to quiet title to a certain 40 acres of land, situated in Woodbury County, Iowa.

PLEADINGS.

PETITION OR BILL.

Defendant in error, by paragraph 2 of his petition or bill, claims title by prescription solely and only. (Record, 1.)

ANSWER AND REPLY.

Plaintiff in error, defendant below, by its answer, deraigns title from the United States specially set up under Act of

Congress of May 15, 1856, granting lands to the State of Iowa to aid in the construction of a line of railroad from Dubuque to Sioux City and alleges that the line of road was built, the lands earned and duly conveyed to defendant in error. (Record, 2 and 3; pars. 3 and 4.) This equitable title is admitted by the reply of defendant in error. (Record, 4; pars. 2 and 3.)

Plaintiff in error,, by its answer, also shows that plaintiff's claim or title arises through a claim of one John Carraher under the timber culture act, which was cancelled by the land department July 11, 1891. (Record, 3; par. 7.)

This is admitted by the reply of the defendant in error, and he denies that the timber culture claim mentioned in the answer was the sole or only source of claim or right of title to said real estate by said Carraher. (Record, 4; par. 4.)

By an amendment to his reply, defendant in error sets up a subsequent entry in 1888 under the Timber Culture Act. (Record, 5; par. 8.)

By supplemental answer and cross-bill, filed May 28, 1904, plaintiff in error pleads a certification of the land under the railroad grant made January 24, 1903, after the commencement of this suit, and a patent from the state under the railroad grant, dated February 2, 1903, and prays to have title to the land quieted in it. (Record, 6.)

THE EVIDENCE.

It is admitted that the line of the railroad referred to in the pleadings "was completed in accordance with the Acts of Congress and the Legislature of Iowa by the 1st day of January, 1872, and that the said road is now operated by the Illinois Central Railroad Company." (Record, 17.)

Defendant in error pleaded the filing of the map of definite location of the line of railroad in 1856, and that the land in controversy is within the six miles limits of the grant. (Record, 5; pars. 2 and 3.) This is not denied and the certifica-

tion under which plaintiff in error claims shows that the land is within the six miles limits. (Record, 27; Exhibit 1.)

The map of definite location shows that the railroad extends diagonally through the land in question. (Record, 30, bottom.)

CARRAHER'S POSSESSION AND CLAIM OF TITLE.

Carraher applied to enter the land under the Timber Entry Act, October 2, 1883. His application was rejected by the local land office October 30, 1883, for conflict with the railroad grant. He appealed November 24, 1883, and December 3, 1883, the Commissioner of the General Land Office affirmed the action of the local officers in rejecting Carraher's application. Thereupon Carraher appealed to the Secretary of the Interior, and his appeal was submitted on August 25, 1887. (Record, 18, bottom, and 21, letter of commissioner.)

June 17, 1891, the Secretary of the Interior affirmed the action of the local officers and the Commissioner in rejecting Carraher's application. (Record, 23 and 24.)

Pending these proceedings and upon a subsequent application Carraher was by the receiver of the local land office permitted to file on the land in controversy under the Timber Culture Act on the 31st day of May, 1888. (Record, 35.) June 2, 1888, his attorney forwarded the receiver's receipt by letter, saying to him; "You can take possession and proceed to comply with the timber culture laws." (Record, 36; Exhibit J.)

This action of the local receiver was held to be without authority, and the entry was cancelled July 11, 1891, at the time the final decision of the Secretary of the Interior on Carraher's first application was transmitted to the local land office. (Record, 23, letter of Commissioner.) And the cancellation was duly entered by the register and receiver of the local office under date of July 11, 1891. (Record, 30; Exhibit 5.)

From that day the record shows no semblance of color or claim of title on the part of Caraher. It is shown that Carraher

planted some trees on the land in 1888, 1889, or 1890. (Record, 8, near top, and 16, top.) It is not shown that he planted a tree or made an effort to comply with the Timber Culture Act after the decision of 1891, holding the land not subject to entry under that Act and cancelling the entry which the receiver had permitted without authority. He simply remained in possession, a naked trespasser, cultivated a portion of the land or rented it, until he executed a quit claim deed to the defendant in error on October 26, 1901, for the highly meritorious consideration of five dollars. (Record, 12; Exhibit B, middle of page.) Thereafter the defendant in error remained in possession, but he does not testify or pretend that he bought the land in good faith, that he believed that Carraher had a title, or that he had any belief of title or right or made any claim of title or right, on his part.

The record is wholly silent as to any claim of good faith on the part of Carraher, or any claim of a belief on his part of a right to the land in connection with his possession.

His son testified: "My father claimed to own the land at the times I have mentioned." (Record, 8.)

Another witness, who worked for him, says: "During the years 1896 and 1897 I heard a good many times Mr. Carraher speak of owning this 40." (Record, 9, bottom.)

Another witness, who rented of him, says: "Mr. Carraher always claimed to own this land in my business relations with him that year" (1899). "He did not say anything about claiming to own it but he spoke of it as his 40." (Record, 11, top.) "There are no buildings on the 40." (Record, 11, bottom.)

There are other like claims of ownership on Carraher's part shown in the record, but nothing more.

No witness testifies that he ever professed a claim or belief of right under his cancelled timber culture entry. Carraher himself was deceased prior to the inception of this litigation. (Record, 7, bottom.) His attorney, Judge Wakefield, says of him: "He owned a half section of land or something in that

neighborhood out there; he was a man of a good deal of natural intelligence. I think he had a quick grasp of anything that related to his interests. A reasonably intelligent farmer." (Record, 16, bottom; 17, top.) "He had an 80 that joined this 40 on the north." (Record, 8, middle.) "In 1898 he lived on another place of his in Concord Township, in the same section as this 40." (Record, 11, last half.)

WHY PATENT UNDER RAILROAD GRANT WAS DELAYED.

1. The certification and patent under the railroad grant was delayed by a swamp land claim of the State of Iowa not decided until 1878. (Record, 18, middle; 24, letter of McFarland, Commissioner.)

2. By Carraher's application to enter under timber culture act not decided until June 17, 1891, and transmitted to local officers July 11, 1891. (Record, 23; and see also Record, 18 and 19.)

3. By Carraher's claim that railroad grant was fully satisfied; the grant was not adjusted until April 9, 1891. (Record, 19, middle; Volume 12, Decisions of Department of Interior, 374.)

4. The certification was afterwards withheld for required certificates from railroad division, mineral division, and reexamination as to swamp land records. (Record, 27 and 28.)

Mr. S. S. Burdette, attorney for the railroad grant, was unable to secure an earlier certification. (Record, 19, 20 and 21.)

JUDGMENTS OF COURTS BELOW.

The trial court awarded the land to defendant in error and entered a decree quieting his title thereto. (Record, 33, bottom.)

On appeal the Supreme Court of Iowa affirmed the judg-

ment of the trial court. (Record, 42.) Thereupon plaintiff in error sued out this writ of error.

The Supreme Court of Iowa held that the statute of limitations of that state began to run in 1891, while the title under the railroad grant was still withheld by the government, and that plaintiff below, defendant here, had acquired title by prescription. (See Opinion, Record, 37 to 42) Reported 129 Iowa, 32.

ASSIGNMENT OF ERRORS.

The plaintiff in error says there was manifest error upon the face of the record in this:

1. The court below erred in holding that adverse possession or title by prescription could be predicated upon possession made and continued while the land department withheld title under the railroad grant for the purpose of administering the grant.

2. The court below erred in holding that adverse possession or title by prescription could be predicated upon Carraher's entry under the Timber Culture Act made in 1888 at a time when refusal to permit such entry had on Carraher's appeal been affirmed by the commissioner of the general land office and was pending on his appeal before the Secretary of the Interior.

3. The court below erred in refusing to give effect to the order of the land department cancelling Carraher's entry under the Timber Culture Act of May 31, 1888.

4. The court below erred in holding that title by prescription could be predicated upon Carraher's entry under the Timber Culture Act on May 31, 1891, after the same had been cancelled by the land department, and after the land department had held on Carraher's appeal that the land was not subject to entry under the Timber Culture Act.

5. The court below erred in holding that Carraher's entry under the Timber Culture Act gave color of title as against the railroad grant.

6. The court below erred in holding that Carraher took and maintained possession in good faith under his timber culture entry after the same was, to his knowledge, decided by the land department to be contrary to law and unauthorized by law, and after the same was cancelled by said department.

7. The court below erred in holding that title by prescription against the government grant and patent could be predicated upon mere claim of right to acquire the land under the Timber Culture Act.

8. The court below erred in holding that the Iowa statute of limitations giving title by prescription began to run from the year 1891, notwithstanding the land department still withheld certification of the land and retained the title in the government while administering the grant.

9. The court below erred in holding that Carraher, a naked trespasser, could acquire title by prescription while such title was withheld from the railroad grant by the land department and remained vested in the United States.

POINTS OF LAW AND FACT.

I.

FEDERAL QUESTIONS.

1. The claim of plaintiff in error, specially set up and pleaded, of title to the land under a grant and certification the equivalent of a patent from the United States, has been denied by the court below. This presents a federal question.

2. Its like claim that title by prescription could not be acquired against it while certification was refused under the railroad grant and while the title remained in the United States under decisions, rulings and acts of officers of the United States Government who acted under authority of the United States, has in like manner been denied. This presents a federal question.

3. The decision below that adverse possession may be predicated upon a known unauthorized entry notwithstanding its cancellation by officers of the land department denies to plaintiff in error the benefit of this action of such officers; and this presents a federal question.

4. In like manner the decision of the court below that Carraher had color of title notwithstanding the cancellation of his entry by the officers of the land department and their decisions that the land was not subject to entry under the Timber Culture Act presents a federal question.

5. This applies also to the question of good faith as to any claim of title under his timber culture entry.

6. It is submitted that all of the assignments of error present federal questions of like nature and character.

II.

NO CLAIM TO TITLE IN FEE.

Carraher's claim under the timber culture entry was not a claim to title in fee which alone can furnish the basis for title by prescription.

Ricard v. *Williams*, 7 Wheat., 59.

Nor can a prescriptive title arise with no claim of right.

Harvey v. *Tyler*, 2 Wall., 328.

Society for Prop. of Gosp. v. *Town of Paulet*, 4 Pet., 480.

A claim under a sheriff's deed void for want of jurisdiction will not support title by prescription.

Walker v. *Turner*, 9 Wheat., 541.

There can be no color of title in an occupant of land who does not hold under an instrument or proceeding or law purporting to transfer the title or to give the right of possession.

Nor can good faith be affirmed of a party in holding adversely where he knows he has no title and that under the law he can acquire none.

Deffeback v. *Hawke*, 115 U. S., 392-407.
Sparks v. *Pierce*, 115 U. S., 412.
Litchfield v. *Sewell*, 97 Iowa, 251.
Hayes v. *United States*, 175 U. S., 260.

Carraher confessed his knowledge and understanding that his entry of 1888 was cancelled and void by never taking steps to prove up or acquire title under his timber culture entry claim. He was entitled to do this in 1896, if at all. Not until that time could the statute run in any case. He continued in possession as a naked trespasser under a known void entry.

Nor has defendant in error done more than this, or attempted to acquire title under the Timber Culture Act.

The case is a clear one of no color of title, and of bad faith in claiming, with full knowledge of no color of title; of bad faith in mere claims.

III.

NO GOOD FAITH CLAIM OF RIGHT.

It is the settled construction of the statute of limitations of Iowa relating to lands, that title by prescription cannot be acquired in the absence of an honest, *bona fide*, good faith claim of title.

Litchfield v. *Sewell*, 97 Iowa, 260.
Wright v. *Keithler*, 7 Iowa, 92.
Smith v. *Young*, 89 Iowa, 340.
Clark v. *Sexton*, 122 Iowa, 313.
Snell v. *Mecham*, 80 Iowa, 55.

No such good faith is shown on Carraher's part. The facts to which attention has been called, *supra*, conclusively show bad faith on his part.

IV.

COURTS CANNOT INTERFERE WHILE TITLE IS WITHHELD BY LAND DEPARTMENT, IN ADMINISTRATION OF THE GRANT.

Humberg v. *Avery*, 195 U. S., 498, and cases there cited.

Oregon v. *Hitchcock*, 202 U. S., 70.

V.

STATUTE OF LIMITATIONS WILL NOT RUN WHILE GOVERNMENT WITHHOLDS TITLE.

Nor can the statute of limitations run or title by prescription have its inception while the land department withholds the title in the administration of the grant.

Gibson v. *Choteau*, 13 Wall., 92.

Redfield v. *Parks*, 132 U. S., 246, and cases there cited.

Morrow v. *Whitney*, 95 U. S., 557.

North. Pac. Ry. Co. v. *Traill Co.*, 115 U. S., 600.

Ry. Co. v. *Prescott*, 16 Wall., 603.

Ry. Co. v. *McShane*, 22 Wall., 444.

Churchill v. *Swords*, 478 Iowa, 473.

Durham v. *Hoosman*, 88 Iowa, 36.

Dickerson v. *Yetzer*, 53 Iowa, 681.

Grant v. *Ry. Co.* 54 Iowa, 673.

U. S. v. *Montana Mnfg. Co.*, 196 U. S., 577.

VI.

CANCELLATION OF TIMBER CULTURE ENTRY CAN NOT BE COLLATERALLY ASSAILED.

As to this, see—

Brown v. *Gurney*, 201 U. S., 193.

Steele v. *Smelting Co.*, 106 U. S., 447.

Smelting Co. v. *Kemp*, 104 U. S., 636.

ARGUMENT.

I.

TITLE BY PRESCRIPTION.

It seems obvious that where the title has been withheld by the land department in the orderly administration of the grant, and in the settlement of questions connected therewith, the state statute of limitations can not run, and title by prescription can not have its inception, until the title finally passes from the government.

In such case the rule obtains that—

> "With the legal title when transferred goes the right to possess and enjoy the land and it would amount to a denial of the power of disposal in Congress if these benefits which follow upon the acquisition of that title could be forfeited because they were not asserted before that title was issued."
>
> *Gibson* v. *Chouteau*, 13 Wall., 92.

See also cases cited in point V of brief, *supra*, including those from Iowa, where this doctrine has been repeatedly recognized.

The fact clearly shown by the record that the title was withheld for the purpose of the administration of the grant distinguishes the case at bar from

Deseret Salt Co. v. *Tarpey*, 142 U. S., 241.

Toltec Range Co. v. *Cook*, 191 U. S., 532,

and other like cases.

Those decisions were where the equitable title was undisputed and certain, and the legal title might have been acquired on application. In the case at bar, on the contrary, the equitable right was drawn in question continuously, and the beneficiaries of the railroad grant were unable to procure the legal title by certification or patent until 1903, although the record shows that they were engaged in continuous efforts to do so.

To hold that the statute of limitations will run under such

circumstances, or title by prescription have its inception and become complete, is to nullify and abrogate a patent of the United States before the party entitled to it can procure its issuance by the most diligent and continuous efforts.

Under such circumstances it is submitted that the doctrine of *Gibson* v. *Chouteau* must apply. The distinction between this and decisions of the other type above referred to is too broad to require elucidation or to be overlooked.

NO COLOR OF TITLE NOR GOOD FAITH CLAIM OF RIGHT.

II.

Nor was there color of title or good faith claim of right upon which to predicate title by prescription.

Thus it is said regarding the Iowa statute of limitations and title by prescription under it:

> "No such rule obtains in favor *of one actually knowing that he or she has no title or claim. An adverse possession must be in good faith.*"
>
> *Smith* v. *Young*, 89 Iowa, 340.

In the case at bar Carraher had the fullest knowledge that the land was not subject to entry under the Timber Culture Act. He knew, therefore, that his attempted entry of 1888 was absolutely void, and it is submitted he must be held to have known that this entry was cancelled in 1891.

Undoubtedly it was this knowledge which deterred him from ever attempting to prove up and secure title under the Timber Culture Act.

Under the decisions of Iowa, then, as well as under the decisions of this court cited in Point II of brief, *supra*, there was no semblance of color or claim of title upon which to predicate the running of the statute or the inception of title by prescription. Furthermore, there must have been good faith on Carraher's part. As to this a recent Iowa decision announces the accepted doctrine:

> "We are committed to the doctrine that possession to be adverse must have been held to be in good faith. If one knows that he has no title or claim, if his possession is merely wanton, his occupation, no matter how long continued, will not ripen into a title. To hold otherwise would be to convert the statute of limitations into a cover for fraud instead of giving to it the proper application as a statute of repose."
>
> *Clark* v. *Sexton*, 122 Iowa, 313.

Obviously a patent of the United States when issued cannot be overturned by mere naked possession, or a bad faith entry upon the land which the patent purports to convey. Other Iowa decisions cited in Point III of brief, *supra*, maintain the same doctrine. It is the settled construction of the statute of Iowa.

Nor can the defendant in error, in order to make some showing of color of title, collaterally assail the action of the land department in cancelling Carraher's attempted entry of 1888.

See cases, Point VI of brief, *supra*.

Carraher, therefore, certainly knew that he was a naked trespasser. His possession under these circumstances could not affect the title conveyed by the grant and the certification thereunder. The language of this court is peculiarly appropriate:

> "But neither in a separate suit in a federal court, nor in an answer of ejectment in a state court, can the mere occupation of the demanded premises by plaintiffs or defendants for the period prescribed by the statute of limitations of the state, be held to constitute a sufficient equity in their favor to control the legal title subsequently conveyed to others by the patent of the United States, without trenching upon the power of Congress in the disposition of the public lands."
>
> *Gibson* v. *Choutcau*, 14 Wall., 103.

The Act of Congress of March 3, 1887, as amended by the Act of February 12, 1896, imposes upon the land department the duty of adjusting the railroad grant under which plaintiff

in error claims. The department did not complete this adjustment and have the final certificates made showing the land clear from the swamp land grant and from the Mineral Act until 1903, retaining the matter *in fieri* until that date in spite of all efforts under the grant to procure the title earlier.

On the other hand, the record shows that Carraher was not a poor and meritorious settler, attempting to secure a home in good faith under the Timber Culture Act; but he was a thrifty and prosperous farmer owning adjoining lands. With no color of title or claim of right, as he well knew, he entered on a venture relative to the 40 in controversy, and leasing the land for many years at a remunerative rental, thus making a good thing anyway and taking his chances as to final results.

The quit claim deed to defendant in error for $5 well illustrates the idea which all the parties had as to the lawfulness or fairness of this enterprise. It was reserved to the decree of a court to transform this $5 venture and speculation into a lawful title to a tract of land worth thousands of dollars.

It is respectfully submitted that this is not the mission of the courts, and that the judgment below ought to be reversed.

CHAS. A. CLARK,
WM. G. CLARK.

FILE COPY.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

Office Supreme Court, U. S.
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JAMES H. McKENNEY,
CLERK

No. 207.

THE IOWA RAILROAD LAND COMPANY,
PLAINTIFF IN ERROR,

vs.

CLAUDE F. BLUMER, DEFENDANT IN ERROR.

APPENDIX TO BRIEF FOR PLAINTIFF IN ERROR. STATUTES REFERRED TO IN ARGUMENT.

CHARLES A. CLARK,
Counsel for Plaintiff in Error.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C. 25077

(20,098.)

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Appendix to Brief for Plaintiff in Error. Statutes Referred to in Argument.

11 Stat. at L., 9.

An act making a grant of lands to the State of Iowa, in alternate sections, to aid in the construction of certain railroads in said State.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That there be and is hereby granted to the State of Iowa, for the purpose of aiding in the construction of railroads from Burlington, on the Mississippi river, to a point on the Missouri river near the mouth of the Platte river; from the city of Davenport, via Iowa City and Fort Des Moines, to Council Bluffs; from Lyons City northwesterly to a point of inter-

section with the main line of the Iowa Central Air Line Railroad, near Maquoketa, thence on said main line, running as near as practicable to the forty-second parallel across the said State to the Missouri river, from the city of Dubuque to a point on the Missouri river near Sioux City, with a branch from the mouth of the Tete Des Morts to the nearest point on said road, to be completed as soon as the main road is completed to that point, every alternate section of land, designated by odd numbers, for six sections in width on each side of each of said roads. But in case it shall appear that the United States have, when the lines or routes of said roads are definitely fixed, sold any sections, or any parts thereof, granted as aforesaid, or that the right of pre-emption has attached to the same, then it shall be lawful for any agent or agents, to be appointed by the governor of said State, to select, subject to the approval of the Secretary of the Interior, from the lands of the United States nearest to the tiers of sections above specified, so much land, in alternate sections, or parts of sections, as shall be equal to such lands as the United States have sold or otherwise appropriated, or to which the rights of pre-emption have attached as aforesaid; which lands (thus selected in lieu of those sold and [to] which pre-empion rights have attached, as aforesaid, together with the sections, and parts of sections, designated by odd numbers as aforesaid, and appropriated as aforesaid) shall be held by the State of Iowa for the use and purpose aforesaid: *Provided,* That the land to be so located shall, in no case, be further than fifteen miles from the lines of said roads, and selected for and on account of each of said roads: *Provided, further,* That the lands hereby granted for and on account of said roads severally shall be exclusively applied in the construction of that road for and on account of which such lands are hereby granted, and shall be disposed of only as the work progresses, and the same shall be applied to no other purpose whatsoever: *And provided further,* That any and all lands heretofore reserved to the United States, by any act of Congress, or in any

other manner by competent authority, for the purpose of aiding in any object of internal improvement, or for any other purpose whatsoever, be and the same are hereby reserved to the United States from the operation of this act, except so far as it may be found necessary to locate the routes of said railroads through such reserved lands, in which case the right of way only shall be granted, subject to the approval of the President of the United States.

SEC. 2. *And be it further enacted,* That the section and parts of sections of land which, by such grant, shall remain to the United States within six miles on each side of said roads, shall not be sold for less than double the minimum price of the public lands when sold; nor shall any of said lands become subject to private entry until the same have been first offered at public sale at the increased price.

SEC. 3. *And be it further enacted,* That the said lands hereby granted to the said State shall be subject to the disposal of the legislature thereof, for the purposes aforesaid, and no other; and the said railroads shall be and remain public highways for the use of the Government of the United States, free from toll or other charge upon the transportation of any property or troops of the United States.

SEC. 4. *And be it further enacted,* That the lands hereby granted to said State shall be disposed of by said State only in manner following; that is to say, that a quantity of land not exceeding one hundred and twenty sections for each of said roads, and included within a continuous length of twenty miles of each of said roads, may be sold; and when the governor of said State shall certify to the Secretary of the Interior that any twenty continuous miles of any of said roads is completed, then another quantity of land hereby granted, not to exceed one hundred and twenty sections for each of said roads having twenty continuous miles completed as aforesaid, and included within a continuous length of twenty miles of each of such roads, may be sold, and so from time to time until said roads are completed; and if any of

said roads are not completed within ten years, no further sale shall be made, and the lands unsold shall revert to the United States.

SEC. 4. *And be it further enacted*, That the United States mail shall be transported over said roads, under the direction of the Post-Office Department, at such price as Congress may by law direct: *Provided*, That until such price is fixed by law, the Postmaster-General shall have the power to determine the same."

Approved May 15, 1856.

13 Stat. at L., 95.

An act to amend an act entitled "An act making a grant of land[s] to the State of Iowa, in alternate sections, to aid in the construction of certain railroads in said State," approved May fifteen, eighteen hundred and fifty-six.

SEC. 1. Relates to line from Davenport to Council Bluffs.

"SEC. 2. *And be it further enacted*, That whenever such new location shall have been established, the said railroad company shall file in the General Land Office at Washington a map, definitely showing such new location; and the Secretary of the Interior shall cause to be certified and conveyed to said company from time to time, as the road progresses, out of any public lands now belonging to the United States not sold, reserved, or otherwise disposed of, or to which a pre-emption claim or right of homestead settlement has not attached, and on which a *bona fide* settlement and improvement has not been made under color of title derived from the United States or from the State of Iowa, within six miles of such newly located line, an amount of land per mile equal to that originally authorized to be granted to aid in the construction of said road by the act to which this is an amendment; and if the amount of land granted by the original act to aid in the construction of said railroad shall not be found

within the limit of six miles from such line, then such selections may be made along such line within twenty miles thereof: *Provided*, That the said company shall not be entitled to, and shall not receive, any land under this grant which is situate within fifteen miles of the line of the Burlington and Missouri River railroad, as indicated by the map of said road, now on file in the General Land Office.

SEC. 3. Relates to line from Burlington to Missouri river.

SEC. 4. Relates to line from Clinton to Council Bluffs.

* * * "*Provided, however*, That no lands shall be conveyed to any company or party whatsoever, under the provisions of this act and the act amended by this act, which have been settled upon and improved in good faith, by a *bona fide* inhabitant, under color of title derived from the United States or from the State of Iowa adverse to the grant made by this act or the act to which this act is an amendment. But each of said companies may select an equal quantity of public lands as described in this act within the distance of twenty miles of the line of each of said roads in lieu of lands thus settled upon and improved by *bona fide* inhabitants in good faith under color of title as aforesaid."

SEC. 5. Relates to line from Clinton to Council Bluffs.

"SEC. 6. *And be it further enacted*, That the Dubuque and Sioux City Railroad Company may so far change their line between Fort Dodge and Sioux City as to secure the best route between those points; said change shall not impair the right to, nor change the location of, their present land grant A map of the change shall be filed with the Commissioner of the General Land Office within one year after the passage of this act.

SEC. 7. *And be it further enacted*, That all of the conditions and limitations contained in the act to which this act is an amendment, and not expressly changed by this act, shall attach to and run with the grants made by this act, except as the said conditions and limitations have been modi-

fied, and may hereafter be modified, by the General Assembly of the State of Iowa.

SEC. 8. *And be it further enacted,* That no lands hereby granted shall be certified to either of said companies until the governor of the State of Iowa shall certify to the Secretary of the Interior that the said company has completed, ready for the rolling stock, within one year from the first day of July next, a section of not less than twenty miles from the present terminus of the completed portion of said railroad, and in each year thereafter an additional section of twenty miles; but the number of sections per mile originally authorized shall be certified to each company, upon proof as aforesaid of the completion of the additional sections of the road as aforesaid; and upon the failure of either company to complete either section as aforesaid, to be annually built, the portion of the land remaining uncertified shall become subject to the control and disposition of the legislature of the State of Iowa, to aid in the completion of such road.

SEC. 9. *And be it further enacted,* That all lands hereafter certified to either of the land-grant railroads in said State, and lying opposite any completed section of such road, shall be offered for sale by the company to which they shall be certified within three years from the completion of such section, if then certified; and if not, then within three years from the date of such certificate at reasonable prices; and if not all sold within that period then during the fourth year all such lands remaining unsold shall be exposed to public sale, after previous notice posted at the county seat of the county in which such lands shall be situated, to the highest bidder, and in tracts not exceeding one hundred and sixty acres each."

Approved June 2, 1864.

15 Stat. at L., 38.

An act extending the time for the completion of the Dubuque and Sioux City railroad.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the time for completing a line of railroad from Dubuque to Sioux City, in the State of Iowa, for the construction of which lands were granted in alternate sections to said State by act entitled "An act making a grant of lands to the State of Iowa in alternate sections to aid in the construction of railroads in said State," approved May fifteenth, eighteen hundred and fifty-six, be, and the same is, extended until the first day of January, eighteen hundred and seventy-two, subject to the reverter mentioned in said act at the expiration of the time herein limited: *Provided*, [That] said road shall be constructed on the most practical route by way of Webster City and Fort Dodge to Sioux City, which route shall be at all points within the limits of said land grant, and the same shall be completed to Fort Dodge on or before the first day of July, eighteen hundred and sixty-nine, and thereafter at the rate of not less than forty miles each year; and the said road shall be constructed, operated, and maintained as one continuous and unbroken line of road from Dubuque to Sioux City; and no lands shall be disposed of, or patented, or certified for said purposes more than forty miles in advance of the point to which said road may be constructed from time to time.

Approved March 2, 1868.

Revision, Iowa, 1860, pp. 215–218.

An act to accept of the grant and carry into execution the trust conferred upon the State of Iowa by an act of Congress entitled an Act making a grant of lands to the State of Iowa, in alternate sections, to aid in the construction of railroads in said State, approved May 15th, 1856.

SECTION 1299. (1.) *Be in enacted by the General Assembly of the State of Iowa*, That the lands, rights, powers and privileges, granted to, and conferred upon, the State of Iowa, by the act of Congress entitled "An act making a grant of lands to the State of Iowa, in alternate sections, to aid in the construction of railroads, in said State, approved May 15th, 1856," be and the same are hereby accepted upon the terms, conditions and restrictions, contained in said act of Congress.

* * * * * * *

SEC. 1302. (5.) That so much of the lands, interest, rights, powers and privileges as are or may be granted and conferred, in pursuance of the act of Congress aforesaid, to aid in the construction of a railroad from the city of Dubuque to a point on the Missouri river at or near Sioux City, with a branch from the mouth of the Tete Des Morts to the nearest point on said road, to be completed as soon as the main line is completed to that point, are hereby disposed of, granted and conferred to and upon the Dubuque and Pacific Railroad Company, a body corporate, created and existing under the laws of the State of Iowa.

SEC. 1303. (6.) The lines and routes of the several roads above described shall be definitely fixed and located on or before the first day of April next, after the passage of this act, and maps or plots, showing such lines and routes, shall be filed in the office of the Governor of the State of Iowa, and also in the office of the secretary of state of the State of Iowa. It shall be the duty of the governor, after affixing his official

signature, to file such map in the department having the control of the public land in Washington; such location being considered final only so far as to fix the limit and boundary within which lands may be selected; and if it shall appear that the lands that have been donated by the act of Congress aforesaid, for the construction of the several lines above indicated, cannot be obtained by said companies within the limits and along any part of the line aforesaid, the governor shall from time to time appoint agents to make such selections as may be authorized or granted by Congress for the lines aforesaid; but the compensation of such agents and the costs, expenses and charges attendant upon and occasioned by making such selections, shall be fixed, regulated, paid and borne by each of said railroad companies respectively, upon and for its own line.

SEC. 1305. (8.) The grants aforesaid are made to each of said companies respectively, upon the express condition, that in case either of such railroad companies shall fail to have completed and equipped seventy-five miles of its road within three years from the first day of December next, thirty miles in addition in each year thereafter for five years, and the remainder of their whole line of road in one year thereafter, or on the first of December, A. D., 1865, then and in that case it shall be competent for the State of Iowa to resume all rights conferred by this act upon the company so failing, and *to resume* all rights to the lands hereby granted and remaining undisposed of by the company so failing to have the length of road completed in manner and time as aforesaid.

SEC. 1310. (13.) The said companies shall each severally assent to and accept the provisions of this act, by a written instrument, under the seal of such corporation, with the signatures of the proper officers, within ninety days after the passage of this act, which said acceptance shall be filed in the office of the secretary of state, and be by the secretary recorded in the book by him kept for the recording of articles of association.

Laws of Iowa, 1868, Ch. 26, pp. 29–31.

An act resuming certain rights conferred upon the Dubuque and Pacific (now Dubuque and Sioux City) Railroad Company by an act approved July 14, 1856, and acts amendatory thereof, and to repeal certain laws in relation thereto.

Whereas, by an act of Congress, approved May 15, 1856, there was granted to the State of Iowa, certain land to aid in the construction of certain railroads in said State, upon certain terms, conditions and restrictions under which said lands might be disposed of; and

Whereas, the General Assembly of the State of Iowa, by an act approved July 14, 1856, accepted said grant of lands upon the terms, conditions, and restrictions contained in said act of Congress, and transferred and granted to the Dubuque and Pacific (now Dubuque and Sioux City) Railroad Company that portion of said lands granted by said act of Congress, to aid in the construction of a railroad from the city of Dubuque to a point on the Missouri river, at or near Sioux City with a branch from the mouth of the Tete Des Morts, to the nearest point on said road, in consideration on the part of said company that it would complete and equip within the time therein specified; and

Whereas, said company having failed to complete and equip said road, as required in said act, obtained by an act of the General Assembly of Iowa, approved April 7, 1862, an extension of time for the completion of said road in further consideration of the release of certain lands in said last-mentioned act described; and

Whereas, the said Dubuque and Pacific (now Dubuque and Sioux City) Railroad Company, has failed and refused to execute the said releases; and has failed to complete and equip the number of miles of their said road as by said acts

of transfer and extension they were required to have completed and equipped at this time; thereby, at the option of the State, annulling all their right and title to the lands so transferred to said company by said act of July 14, 1856, excepting only one hundred and twenty sections of said land for each twenty miles of said road, now completed and equipped, whereby the State has the right to resume all the right, title, and interest in and to the remainder and residue of the land originally granted to said company; and

Whereas, the good faith of the State, in carrying into execution the trust conferred upon her by said act of Congress, requires that the remaining land and all title to the same should be resumed, to the end that the road, to aid which the same was granted, may be speedily completed; Now therefore,

SECTION 1. *Be it enacted by the General Assembly of the State of Iowa,* That all the right, title or interest in and to the land heretofore granted, or intended to be granted, to the Dubuque and Pacific (now Dubuque and Sioux City) Railroad Company, by an act approved July 14, 1856, entitled "An act to accept the grant and carry into execution the trust conferred upon the State of Iowa by an act of Congress, entitled 'An act making a grant of land to the State of Iowa, in alternate sections, to aid in the construction of certain railroads in said State, approved May 15, 1856,'" and acts amendatory and supplementary of the same, be and the same are hereby absolutely and entirely resumed by the State: *Provided, however,* That nothing in this act contained shall be construed to affect or in any manner impair the title of said company to the one hundred and twenty sections of said land for each and every twenty miles of their road which is now completed and equipped.

SEC. 2. The fifth section of said act, approved July 14, 1856, and all other acts and parts of acts inconsistent with this act, are hereby repealed.

SEC. 3. This act, being deemed of immediate importance, shall take effect and be in force from and after its publica-

tion in the *Iowa State Register*, published at Des Moines, and *The Iowa North-West*, published at Fort Dodge, Iowa.

Approved March 10, 1868.

Laws of Iowa, 1868, chapter 124, pp. 164–167.

The Dubuque and Sioux City Land Grant.

An act to legalize, confirm and carry out a contract between the Dubuque and Sioux City Railroad Company and the Iowa Falls and Sioux City Railroad Company, and to extend the time for completing the said railroad from Dubuque to Sioux City, to grant certain lands to the Dubuque, Bell[e]vue, and Sabula Railroad Company for the building of the Tete Des Morts branch, and for other purposes.

SECTION 1. *Be it enacted by the General Assembly of the State of Iowa,* That a contract entered into between the Dubuque and Sioux City Railroad Company of the first part, and the Iowa Falls and Sioux City Railroad Company of the second part, transferring so much of the Dubuque and Sioux City railroad as remains to be constructed, together with the franchises, right of way, depot grounds, and other appurtenances of said road to be completed, also transferring all right and title of the said Dubuque and Sioux City Railroad Company to so much of the lands granted by Congress to aid in the construction of said road as shall appertain to, or be legally applicable to the construction of the uncompleted part of the Dubuque and Sioux City railroad as aforesaid, except as to the lands hereinafter granted to the Dubuque, Bellevue and Sabula Railroad Company, be and is hereby legalized and confirmed.

SECTION 2. That the *pro rata* of six sections of land per mile, reserved by said contract to the Dubuque and Sioux City Railroad Company, and the *pro rata* of six sections per mile, conveyed by said contract to said Iowa Falls and Sioux City Railroad Company, shall be adjusted between said com-

panies as follows, to wit: The land actually conveyed to third parties shall be set apart to said Dubuque and Sioux City Company, not exceeding six sections per mile for the road now built, and if over that number of acres of land have been conveyed, the excess over that amount shall be taken off of the west end of the last installment of the lands so conveyed; and in case less than that amount of lands have been conveyed as aforesaid, then a sufficient amount shall be taken to make up such *pro rata* from that portion of the land grant next adjoining and immediately west, as near as practicable, to the lands last conveyed by said Dubuque and Sioux City Railroad Company.

SECTION 3. That a *pro rata* of six sections per mile of said land grant be and the same is hereby granted to and conferred upon the Dubuque, Bellevue and Sabula Railroad Company, to aid in the construction of said road, known as the Tete Des Morts branch, required to be built by the act of Congress granting said lands to the State of Iowa: *Provided,* That said company shall not encumber or dispose of said lands until the said branch road shall be completed and open for business, and that said branch shall be completed within two years from the first day of January next. Said lands shall be of an average quality and value of so much of said lands granted by the United States as now remain undisposed of, and the governor of Iowa shall select or cause to be selected, the land hereby granted to said Dubuque, Bellevue and Sabula Railroad Company, or cause the same to be reserved from lands outside of the six-mile limits of said grant, and upon completion of said branch, as above provided, he shall execute a patent for said lands to said company.

SECTION 4. That so much of said land grant as is applicable to the uncompleted portion of the road as aforesaid, west of Iowa Falls, excepting the lands hereby granted to said Dubuque, Bellevue and Sabula Railroad Company, is hereby granted to and conferred upon the said Iowa Falls and Sioux City Railroad Company, subject to the terms and conditions of the act of Congress granting the said lands, dated the

fifteenth day of May, A. D. 1856, and the act amendatory thereto, and the act of Congress passed the present session; and also subject to the terms and conditions of this act as herein expressed as follows, to wit: The road shall be completed as a first-class road from Iowa Falls on the route now surveyed, located, and partly graded, through Webster City and Fort Dodge, and the depot buildings shall be erected on the grounds heretofore donated by the people of said towns for that purpose, and shall be completed thence to Sioux City, which route shall be at all points within the limits of the said land grant. The track of said road shall be laid with a good substantial rail, weighing not less than fifty-six pounds per lineal yard. The road shall be completed to Fort Dodge by the 1st day of July, 1869, the time now fixed by act of Congress; one-half of the balance within one year from that time, and the remainder before the first day of January, A. D. 1872; and said road, when any twenty miles shall be completed, shall be subject to the lease of the Illinois Central Railroad Company, transferred to the Iowa Falls and Sioux City Railroad Company, and shall be operated as one continuous and unbroken through line of railroad from Dubuque to Sioux City.

SECTION 5. Said lands so granted, as aforesaid, to the Iowa Falls and Sioux City Railroad Company, shall be patented by the governor to said company as the same shall be earned by the building of said road, but no patent shall be issued by him for any portion of said lands until at least seventy-five miles of road shall be completed, and "no patent shall be made for any lands more than forty miles in advance of the point to which said road may be constructed from time to time," as provided by said act of Congress. No patent shall be made for any lands located within fifty miles of Sioux City, until said company shall have its entire road completed to Sioux City, except for such road as said company may cause to be built and operated from Sioux City eastward, and when said company shall have forty miles

of road built and operated from Sioux City eastward, then this restriction shall cease, and such lands may be patented for any road built by said company; and no patent shall include lands situate in more than one county, and such patent shall be, by said company, recorded in the county where said lands lie, and a certified copy of the record of the same may be used as evidence with the same effect as the original. And in case any of said lands hereby granted are now, and were on the first day of January last, occupied by actual settlers residing thereon and improving the same, upon such settler making proof to the satisfaction of the register of the State land office of such settlement and improvement, he shall be entitled to purchase not exceeding one-quarter section of land of the State at the rate of $2.50 per acre, and when such land shall have been earned by the extension of said road, upon the payment to the said company of the said sum, the governor shall execute a patent to such actual settler for said land.

SECTION 6. The legislature shall have the power to resume the lands not earned at the time of such resumption, on default of said company to build said road to Fort Dodge by the first day of July, 1869, or any portion of the road within the time limited herein, or in case they shall be satisfied that said company is not pushing forward the work on said road with reasonable diligence, so as to warrant the belief that the whole line will be completed to Sioux City by the first day of January, 1872.

SECTION 7. The said Iowa Falls and Sioux City Railroad Company shall signify their acceptance of the terms and conditions of this act, by a written instrument, signed by the president of said company, to be filed with the governor within thirty days after the passage of this act. * * *

Approved April 7, 1868.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1906.

No. 207.

THE IOWA RAILROAD LAND COMPANY,
Plaintiff in Error,

vs.

CLAUDE F. BLUMER.

IN ERROR TO THE SUPREME COURT OF IOWA.

REPLY BRIEF FOR PLAINTIFF IN ERROR

—BY—

CHARLES A. CLARK.

Eastman Bros., Law Printers, 358 Dearborn St., Chicago.

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I.

TITLE DID NOT PASS UNDER RAILROAD GRANT OF 1856 AS AMENDED BY ACT OF 1864.

A matter of first importance, pointed out on page 11 of opening brief for plaintiff in error is, that the title did not pass from the Government under the grant of 1856 as amended by the Act of 1864. It was, moreover, withheld by the Land Department for the purpose of the adminstration of the grant, thus distinguishing the case from *Toltec Ranch Company* v. *Cook*, 191 U. S., 532, and other like cases cited on page 11 of brief for defendant in error.

It is undoubtedly true that the original grant of 1856 by Sec-

tion 1 made an out-and-out grant of the lands to the State of Iowa.

Section 4 of that act imposed restrictions upon the state as to the disposition of the lands and provided, "if any of said roads are not completed within ten years, no further sale shall be made, and the lands unsold shall revert to the United States."

This ten years expired in 1866, and there is no pretense that the road from Dubuque to Sioux City was completed within that time.

By the Act of March 2, 1868, the time for completing the road was extended to the first day of January, 1872. On March 10, 1868, the Legislature of Iowa resumed the grant of lands for this line of road, as made to the original railroad grantees. (See Appendix, pp. 10, 11 and 12.) Meanwhile, by the Act of June 2, 1864 (Appendix, pp. 4, 5 and 6), Congress provided by Section 8 thereof:

> "That no lands hereby granted shall be certified to either of said companies until the Governor of the State of Iowa shall certify to the Secretary of the Interior that the said company has completed, ready for the rolling stock, within one year from the first day of July next, a section of not less than twenty miles from the present terminus of the completed portion of said railroad, and in each year thereafter an additional section of twenty miles; but the number of sections per mile originally authorized shall be certified to each company, upon proof as aforesaid of the completion of the additional sections of the road as aforesaid; and upon the failure of either company to complete either section as aforesaid, to be annually built, the portion of the land remaining uncertified shall become subject to the control and disposition of the legislature of the State of Iowa, to aid in the completion of such road."

The clear object and purpose of this section was to hold the legal title of the lands in the United States until the respective railways were built and completed as therein specified.

Let it be conceded that this would not be effective as to the

original railroad grantees under Act of the Legislature of Iowa of July 14, 1856 (Appendix, pp. 8 and 9); it still remains true that when the road was not completed as required by the grant of 1856, the lands then unsold reverted to the United States (Appendix, p. 4, top); and when Congress extended the grant in 1868 (Appendix, p. 7), the Act of 1864 became and was of full force and effect as to withholding the title to the lands and certifying them only in accordance with Section 8 of that act above quoted.

Hence the grantee of plaintiff in error, the Iowa Falls & Sioux City Railroad Company (Record, p. 3, par. 4, and p. 4, par. 2), never took the legal title to the land in controversy until it was certified under Section 8 of the Act of 1864. It is admitted (Record, p. 17) that the road was completed by the first day of January, 1872, within the time fixed by the Act of Congress, March 2, 1868 (Appendix, p. 7) extending the grant.

The lands had, therefore, been earned by plaintiff's grantee, but it could not and did not secure the legal title until certified January 20, 1903 (Record, pp. 27 and 28), and patented to it by the Governor of Iowa February 2, 1903. (Record, p. 29, Division II.)

It will be observed that Section 4 of the Act of the Legislature of Iowa, approved April 7, 1868, granted the lands to the Iowa Falls & Sioux City Railway Company, grantor of plaintiff in error, "subject to the terms and conditions of the Act of Congress granting the said lands, dated the fifteenth day of May, A. D. 1856, and the ACT AMENDATORY THERETO, and the Act of Congress passed the present session;" and also subject to other terms and conditions; while Section 5 of that act provided for the manner in which the lands granted should be patented by the Government to the railroad company. (Appendix, pp. 13, 14 and 15.)

A clearer case that the legal title to the lands did not pass until certified under Section 8 of the Act of Congress of 1864

and patented under the above Act of the Legislature of Iowa could hardly be made out.

It will be observed that the patent from the State of Iowa was issued under the Act of the Legislature granting these lands to the Iowa Falls & Sioux City Company.

This patent was required to be recorded by the laws of Iowa; Code of Iowa, 1897, Section 2939.

The Supreme Court of Iowa has recognized the doctrine that where lands have not been certified under the railroad grant of 1856 as amended, the legal title does not pass.

Dickerson v. *Yetzer*, 53 Iowa, 681.

Grant v. *Iowa R. R. Co.*, 54 Iowa, 673.

Doe v. *Land Co.*, 54 Iowa, 657.

Land Co. v. *Fitchpatrick*, 52 Iowa, 244.

Iowa Homestead Co. v. *Webster County*, 21 Iowa, 221.

As late as 1897 the rule of these cases was reaffirmed by the Supreme Court of Iowa with reference to this very land grant. The court said:

> "Now, it has been frequently held that such certification and patent *operate to transfer the legal title*, subject to be decreed to another who subsequently shows himself entitled thereto. . . . The cases of *Land Co.* v. *Fitchpatrick*, 52 Iowa, 244; *Iowa Homestead Co.* v. *Webster County*, 21 Iowa, 221; *Dickerson* v. *Yetzer*, 53 Iowa, 681; *Doe* v. *Land Co.*, 54 Iowa, 657; and *Grant* v. *Land Co.*, 54 Iowa, 673, are not in point, for the reason that in none of them was the land certified by the general government, and patented by the state. On the contrary, in each case *the title was withheld* by the general government pending a controversy between conflicting claimants, and it was thought improper to hold that the land was subject to taxation and to tax sales while the United States had a duty to perform in regard to it."
>
> *Iowa Railroad Land Co.* v. *Davis*, 102 Iowa, 132.

Numerous Iowa cases holding railroad lands under the grant of 1856, as amended by the Act of 1864, subject to taxation, all go upon the same ground. These cases hold such lands taxable only after they are earned and the company thus becomes

entitled to them. It is said that the companies then have *a taxable interest.* If they held the legal title the lands would be taxable, although encumbered by the requirement that certain conditions should be performed, or by any other encumbrance.

The cases cited by the learned counsel for defendant in error on pages 2 and 3 of their brief do not conflict with the rule for which we contend.

C. R. I. & P. Ry. v. *Grinnell*, 51 Iowa, 476, was where a naked trespasser entered into possession of the land after the railroad was fully constructed and the land fully earned. It appears from a remark of the court on page 485 that *the lands had also been certified*, the equivalent of a patent. Under these circumstances it was held that the railroad company had title to eject a naked trespasser. Nothing more is decided by that case.

Sioux City v. *Griffey*, 72 Iowa, 505, was a case where the land in controversy was not subject to the grant of 1856. It was excluded by the terms of the grant. Nothing more is decided in that case.

Nor did this court decide more when the case was brought here on writ of error. After fixing the time when the rights of the railroad company attached under the grant as the time when the map of definite location was filed, and not when the line was surveyed and staked out upon the surface of the ground, this court said, opinion by Mr. Justice Brewer:

> "Inasmuch as Griffey's pre-emption right had attached to this land *prior to such time, it did not pass to the railroad company under the grant;* it was a matter of no moment to the company what thereafter became of the title."
>
> *Sioux City Co.* v. *Griffey*, 143 U. S., 38-40.

True, this court says in that case that the grant was *in praesenti.* But the grant of inchoate right may be *in praesenti*, and the legal title may never pass.

Such are the decisions of this court as to the swamp land grant.

McCormick v. *Hayes*, 159 U. S., 332.

Rogers Co. v. *Am. Emigrant Co.*, 164 U. S., 570.

B. & M. R. R. Co. v. *Lawson*, 58 Iowa, 145, does not purport to determine that the legal title to the lands passed under the railroad grant as amended. There the defendant had attempted to enter the land as a homestead as late as 1878, after the land had been fully earned, and it was held that it was not subject to homestead entry. The court said:

> "It appears to us that whether the lands were withdrawn from sale or homestead or pre-emption or not, no valid sale or pre-emption could be made simply because the grant to the railroad company *had attached* to these identical lands. It was a present grant subject to be defeated upon failure to complete the railroad as required by law and upon no other ground. . . . THE RAILROAD WAS COMPLETED AND THE LAND PROPERLY CERTIFIED AS REQUIRED BY LAW, AND THE TITLE TAKEN THEREBY RELATED BACK TO THE DATE OF THE GRANT." (Page 148, bottom.)

It thus appears that the Supreme Court of Iowa in that case held *precisely the reverse* of the rule contended for by counsel for defendant in error, and in support of which contention the case is cited.

The case of *Iowa Falls & Sioux City Ry.* v. *Beck*, 67 Iowa, 421, involved lands upon which pre-emption claims had been filed before the filing of the map of definite location of the road. It was simply held that these lands were excepted from the grant, and nothing more was decided. It became wholly immaterial to determine when the legal title passed under the railroad grant, and nothing is decided as to this. If there were any intimation upon this question, it would be pure *dictum* and not decision.

In *C. B. & Q. R. R. Co.* v. *Lewis*, 53 Iowa, 102, it distinctly appears on page 103 that *the lands in controversy had been certified* by the Land Department and Secretary of the Interior under the railroad grant, and also certified by the Governor of Iowa to the railroad company. The holding of the court appears to be (page 107) that this certification was admissible

in evidence for the very reason that the title did not pass without it.

The case nowhere holds or intimates that the railroad company would have taken title under the grant, sufficient to maintain ejectment, in the absence of the certification standing in the place of the patent.

Courtright v. *C. R. & M. R. R.*, 35 Iowa, 387, is where the original railway company, grantee, had sold to Courtright certain of the lands in 1858 (see page 390) long before the Act of Congress of 1864, and before the lands had been forfeited or reverted. It was held that his title was good as against a subsequent railroad grantee claiming under a forfeiture for non-compliance in completing the road. So far as the question as to when the legal title passed was concerned, it arose wholly under the grant of 1856 and a sale made long before the Act of Congress of 1864 was passed.

This, moreover, was confined to the first 120 sections of land authorized to be sold under the grant of 1856. The lands sold Courtright were a portion of this first 120 sections. (See page 395, bottom; 396, top.) It does not appear from the opinion whether these 120 sections were certified by the Land Department and Secretary of the Interior or not. Presumably they were. But, in any event, what is said in that case as to the title of these 120 sections passing under the grant, and with reference to lands authorized by the grant to be sold, and, in fact, sold before any forfeiture, and before the Act of Congress of 1864, can have no bearing upon the question of title involved in the case at bar.

The case of *C. R. I. & P. Ry. Co.* v. *Grinnell*, 51 Iowa, 476, *supra*, was taken by Grinnell on writ of error to this court. This court was far from holding that the legal title passed under the Acts of Congress of 1856 and 1864; it was said, opinion by Mr. Justice Miller:

> "The grant under the Act of 1856 was, as has been often said, a grant *in praesenti*, and, though *exactly what*

this means has been the subject of much controversy, we think its ascertainment is not difficult. The only doubtful element of the problem is the location of the road, which, by the terms of these grants, is necessary to identify the sections granted on each side of it. Whenever that is done so that a surveyor or the officers of the Land Department can protract the lines of the route on the maps of the public lands within the limit of the grants, the identity of the lands granted is mathematically ascertained, and the title *relates back* to the date of the grant.

"So far as lands are found in place when this is done, not coming within the exceptions as sold or held under pre-emption, the title, or at least *the right to this land in place*, is at once vested in the state or in the company to which the state has granted it, and the means of ascertaining precisely what lands have passed by the grant is to be found in the map of the line of the road, which is filed in the General Land Office under provisions of the statute. As regards the lands to be selected in lieu of those lost by sale or otherwise, it may be that no valid *right* accrues to any particular section or part of a section until the selection is made and reported to the land office, and possibly not then until the selection is approved by the proper officer.

"None of these difficulties arise in the present case. The location was made and the map filed in the land office, the selection of lieu lands was made and approved, *and the entire list regularly certified to the State of Iowa*, as early as December, 1858, and with this certificate the last act of the United States which could in any event be held necessary to passing the title was performed, and either the State of Iowa or the railroad company—it is immaterial which for the purposes of this suit—had become invested with the full legal title to the lands so certified." (P. 742.)

It was also said, and this applies forcibly to the defendant in error in the instant suit:

"It does not lie in the mouth of every one who chooses to settle on these lands to set up a title which the government itself can only assert by some direct proceeding. These plaintiffs had no right to stir up a litigation which

the parties interested did not desire to be started." (Page 744.)

Grinnell v. *Railroad Co.*, 103 U. S., 739.

The distinction for which we contend was here clearly pointed out, but in its decision this court was far from holding in that case that the legal title passed before certification or patent under the Acts of 1856 and 1864.

The Supreme Court of Iowa did not in the instant suit overrule its own line of previous decisions above referred to, to the effect that the legal title only passed upon certification of the lands. But because there was some type of grant *in praesenti*, viz., as we then contended and now contend, a present grant of the right to earn the lands by building the road and receiving a patent therefor, that court held that as the lands were earned under such grant the statute of limitations would run from the date when they were earned. And so it was said in the opinion:

> "It is conceded that the grant to the railroad company was *in praesenti* and as the company *had earned the land* and all contests pending before the land department had been disposed of prior to 1892, its *ownership* for 10 years preceding the commencement of the action *was such as to be subject to the doctrine of adverse possession.*" (Record, 38.)

It is not held that the plaintiff in error ever had the legal title until it was certified under the railroad grant and patented by the Governor of Iowa in 1903. In support of the above quotation from its opinion, the court cites

Iowa R. R. Co. v. *Fehring*, 101 N. W. Rep., 120,

being one of its own decisions which is on its way to this court for review, together with other cases involving similar questions already upon the calendar of this court.

Turning to this case it will be seen that the Supreme Court of Iowa there distinctly reiterates and upholds its former line of decisions above referred to. It is there said as to lands under the Acts of Congress here drawn in question:

> "As will be observed, *the legal title did not pass from*

> *the United States until the execution of the certificate to the railroad company in 1901, and it is elementary that the statutes of limitations do not run against the Government. Young* v. *Charnquist*, 114 Iowa, 116, 86 N. W. 205; *Wilber* v. *Ry. Co.*, 116 Iowa, 65, 89 N. W. 101."

Then the court immediately adds, *arguendo:*

> " Possibly the company may have earned the land prior to that time; and if its title was perfect, and nothing remained for it to do save receive the certificate of title from the government, it is not perceived why the statute of limitations should not begin to run when entitled to such certificate. . . . In such case *the government retains* but *the naked legal title*, while the beneficiary of the grant is the real owner. But nothing of the kind is suggested in the division of the answer setting up the plea of adverse possession, and in the absence thereof the ownership must be presumed to have been acquired with the execution of the certificate. The averment of the petition that the plaintiff procured the title in 1901 was in no way obviated, and as *prior thereto it was in the government*, the statute of limitations could not have begun to run until then."

What the court below, therefore, does in the suit at bar is to now, *for the first time*, to put in force its suggestion *arguendo* in the Fehring case, and to hold for the first time that although the title is conceded to have remained in the Government until 1903 in spite of the efforts of plaintiff in error to secure it, yet because the lands were earned and plaintiff in error became equitably entitled to them, the statute of limitations therefore began to run while the Government still retained the title.

This new doctrine does not purport to rest, and does not in fact rest upon any statute of Iowa. It is a bald invention of the court below to defeat numerous decisions of that court, as well as this, to the effect that the statute of limitations will not run while the title remains in the Government.

We have no fear that this new invention will be sanctioned by this court.

This contemporaneous and long-continued construction as to whether the legal title passed under the Acts of Congress of

1856 and 1864, acquiesced in and acted upon for practically half a century by the State of Iowa and by the Land Department of the Government, ought not to be lightly disturbed, even if this court should think it might take a different view of the question as an original proposition.

It was well said by the Supreme Court of Massachusetts in a case where the contemporaneous construction of a statute affecting real estate was apparently erroneous upon technical grounds:

> "And although, if it were now *res integra*, it might be very difficult to maintain such a construction, yet at this day the *argumentum ab inconvenienti* applies with great weight. We cannot shake a principle which in practice has so long and so extensively prevailed. If the practice originated in error, yet the error is now so common that it must have the force of law. The legal ground on which this provision is now supported is, that long and continued usage furnishes a contemporaneous construction, which must prevail over the mere technical import of the words."
>
> *Rogers* v. *Goodwin*, 2 Mass., 477.

This court has often recognized the same doctrine:

Stewart v. *Lairt*, 1 Cranch., 299.
Clintob v. *Englebrecht*, 13 Wall., 434.
Ferris v. *Higley*, 20 Wall., 375.
United States v. *Bank*, 6 Pet., 29.
Union Ins. Co. v. *Hoge*, 21 How., 35.
Edwards v. *Darby*, 12 Wheat., 206.
The Laura, 114 U. S., 411.

II.

DELAY IN CERTIFYING THE LAND.

It is argued for defendant in error that the matter of certifying the land was a mere clerical one after the decision against Carraher's application in 1891. Such it may be frankly conceded is the view of Mr. Burdette, one of plaintiff's witnesses, as pointed out in the brief for defendant in error. He also

testified that during the period from 1891 to 1903 the force of clerks in that division was insufficient to promptly perform the necessary labor attendant upon such adjustments and the conveyance of lands under the grant. (Record, 21.)

But other grounds for the delay are shown by the Record. As stated by Mr. Burdette (Record, 19): "One of Carraher's contentions was that the grant in question had been adjudicated in 1863, and was fully satisfied. The long delay in the Secretary's office was in part caused by this contention." And see the decision of Acting Secretary of the Interior. (Record, 23.)

True, an adjustment of the grants was made by the Commissioner and reported to the Secretary in 1891. Mr. Burdette testified to his understanding that this adjustment was approved by the Secretary in his letter of April 9, 1891, "published in Volume 12 of the decisions of the Department of the Interior relating to public lands at page 347." (Record, 19.) That letter of the Secretary, however, simply refers to the adjustment of the Commissioner and its showing of a considerable quantity of land still due under the grant. It studiously refrains from approving the adjustment. On the contrary, it sets up that large quantities of lands not subject to the grant have been erroneously certified, and calls upon beneficiaries of the grant to release their claim and title to these lands. This is done under the Act of 1887 (24 Statutes at Large), requiring all railroad land grants to be adjusted, and requiring the Secretary of the Interior as to railroad companies to whom lands have been erroneously certified to "demand from such company a relinquishment or reconveyance to the United States of all such lands whether within grant or indemnity limits." Pending this demand on the part of the Secretary shown by the above-mentioned letter, and in connection therewith, it would seem that certification of the land in controversy was withheld, very possibly under the idea that the Government might retain this

tract as possible compensation for the lands erroneously certified, or for the purpose of coercing the company to comply with the Secretary's demand, or with a view of further investigation and further adjustment of the grant in connection with the Act of 1887. However this may be, certification of the land in suit was withheld in the face of the demand for it, and in connection with the administration of the grant. While it was so withheld the courts could not interfere to determine the legal title one way or the other. The court has said that as to certifying lands under such circumstances:

> "The solution of the question depends, in part at least, on facts within the province, primarily, of the Secretary of the Interior to find. In short, he, and he alone, must ascertain the facts which enter into the question as to what lands are to go on the lists to be delivered to the railroad grantee or its successor in interest. The court should not, by any decree, as between parties who have no contract relations with each other, attempt indirectly to control the authority and discretion of that officer to determine what lands shall or shall not be included in the lists to be prepared under his direction. The plaintiffs can not invoke the aid of the court to have these questions concluded, even as between them and the defendants, by an admission made in their bill for the purposes of this case. . . . The courts will not interfere with the Land Department in its control and disposal of the public lands under the legislation of Congress so long *as the title in any essential sense* remains in the United States."
>
> *Humbird* v. *Avery*, 195 U. S., 502-3.

And as to delays of the Department in administering such grants, it was said in the same case:

> "But, it is suggested that the final action of the Department may be indefinitely postponed and to the great injury of the railroad grantee and those claiming under it. Delay in such matters was a contingency which an alleged successor in interest of the railroad grantee must have taken into account when accepting the act and assenting to the plan of settlement embodied in it. The Land Department was not required to complete its administration

of the statute within any designated time. The act upon its face directs that the required lists be prepared and delivered to the railroad company as soon as conveniently may be done. It can not be assumed upon this record that the Department has not progressed with the work of administration as rapidly as all the circumstances and its convenience permitted. Even if the fact be otherwise, it is not for the court of equity by its decree to decide in the first instance that the selections made by the railroad company shall be approved by the Secretary." (*Ib.*, 509.)

As said by this court in a recent case relating to the swamp land grant, opinion by Mr. Justice Brewer:

> "Until the legal title passes from the Government, inquiry as to equitable rights comes within the cognizance of the Land Department. Courts may not anticipate its action or take upon themselves the administration of the land grants of the United States."
>
> *Oregon* v. *Hitchcock*, 202 U. S., 70.

See also:

McCormick v. *Hayes*, 159 U. S., 332.

Rogers Locomotive Co. v. *Emigrant Co.*, 164 U. S., 559.

As already pointed out, the court below did not hold that the legal title vested in the grantor of plaintiff in error, either with or without the delay in certifying, but based its decision upon the ground that, having earned the land, its "*ownership*" "was such as to be subject to the doctrine of adverse possession." (Record, 38.)

III.

TITLE BY PRESCRIPTION. CARRAHER'S "GOOD FAITH," COLOR OF TITLE, AND CLAIM OF RIGHT.

1. It will be observed that counsel for defendant in error have not a word to say as to the good faith of Carraher in his alleged adverse possession—not a word. Yet this is a necessary ingredient to title by prescription. The court below found

this element and color of title only by repudiating and disregarding the decision of the Land Department under the timber culture act, in a proceeding instituted by Carraher himself, that the land was not subject to entry under the timber culture act, and that the entry made while that proceeding was pending "was without authority and the entry has this day been cancelled." (Record, 23-24.) This decision was especially set up and relied upon by plaintiff in error. (Record, 3; par. 7.)

The court below found good faith on Carraher's part notwithstanding this decision in Carraher's own proceeding by saying: "But whether Carraher was advised of this is not disclosed. Not having been accorded a hearing nor given any previous notice of the Department's intention to cancel his entry, it is not to be inferred that he was subsequently informed of what had been done. See *Wilbur* v. *Railway Co.*, 116 Iowa, 65, and cases there cited." (Record, 39.)

In the Wilbur case that learned court held that a decision cancelling a homestead entry was "in the nature of hearsay, and not competent to show what was in fact done." (116 Iowa, 67.) The learned court below adds on this question of good faith, "and there is no ground for saying that he was *not* acting in good faith save this knowledge of the adverse decision on his first application in 1891. But he was not claiming under that, but by virtue of the receipt which he had obtained in 1888, and under which, *for all that appears*, he supposed he might acquire the land." (Record, 39.)

As good faith is a necessary ingredient entitled by prescription, it is one of the elements to be proven by the party claiming the prescriptive right. It will be observed that the only suggestion or hint of good faith made by the learned court below is based upon turning this rule around and putting upon the owner of the legal title the burden of showing bad faith. Joined to this is the repudiation of the decision of the Department upon the ground that it *may* not have come to

Carraher's knowledge, imposing upon plaintiff in error the burden of proof as to this also. But the mischief does not end here. That learned court splits a single decision which held the land not subject to Carraher's entry, and cancelled that entry accordingly, into two decisions, one of which Carraher must have known, and the other of which it is said he may not have known. Then the learned court performs the remarkable feat of holding that, although the Land Department decided, and decided rightfully, after having before it for years a proceeding instituted by Carraher, that the land was not subject to entry under the Timber Culture Act, yet Carraher, with full knowledge of this rightful decision, may have been justified in assuming that the land was subject to such entry, and could therefore obtain title by prescription by claiming that it was subject to such entry in the very teeth of a decision by which he was and is incontestably bound. There may be other feats of judicial legerdemain which equal this in divesting the owner of a landed estate of his title, but we have never seen nor heard of them. Manifestly, as to good faith, it can make no difference whether Carraher was strictly bound by the decision cancelling his entry or not. We think it clear that he was, as it was a necessary incident as to his own proceeding to secure such entry. Whether this is so or not, knowing of the decision on his own application, that the land was not subject to timber culture entry, and being absolutely bound by that decision, with no pretense that it did not correctly declare the law, it is impossible that he could in good faith claim that the land was subject to such entry in the teeth of the conclusive adjudication against him. If the juggle can be upheld that he could shut his eyes to a part of the decision and thereby not know that his entry was formally cancelled, it still remains true that knowing of the decision that the land was not subject to entry, and being bound thereby, he necessarily and conclusively knew that his entry was wrongful, whether cancelled or not, and it was not possible

for him to make any claim in good faith under that entry. He never did claim under that entry. The record shows that he simply "claimed he owned the land," being discreetly silent as to all else; not that he ever claimed the right to acquire title under the timber culture act, or that he had acquired title under that act. (See references to Record, page 4, brief for plaintiff in error.)

The learned court below, therefore, at the very basis and foundation of the prescriptive claim, puts its judgment upon denying all effect to the decision of the Land Department and wholly repudiating that decision. Herein, we submit, was patent error. As this is the cornerstone of the whole fabric of the prescriptive title, that fabric tumbles into a mass of ruins, and the contention for defendant in error must fail.

2. The "color of title," then, was based upon a wholly void receiver's receipt, and Carraher knew it. It was no color of title, and it was tainted by bad faith. None the less we have the remarkable feat of a "claim of *right*" based upon this, which the court below held to have ripened into a meritorious and lawful prescriptive title. "Do men," then, "gather grapes of thorns, or figs of thistles"?

3. Regardless of what precedes, it was held that Carraher had a good "claim of *right*," which set the statute of limitations in motion from 1891. We have seen that his claim was one of *wrong*, and bad faith. A claim under a void sheriff's deed, or a void tax deed, will not support title by prescription.

Walker v. *Turner*, 9 Wheat., 541.

Redfield v. *Parks*, 132 U. S., 250.

It was long ago decided by this court, opinion by Mr. Justice Story, that—

> "if the party claim only a limited estate and not a fee, the law will not, contrary to his intentions, enlarge it to a fee."

And as to presumptions of a grant from long possession:

> "They may, therefore, be encountered and rebutted by

> contrary presumptions; and can never fairly arise where all the circumstances are perfectly consistent with the non-existence of a grant; *a fortiori, they can not arise where the claim is of such a nature as is at variance with the supposition of a grant.*"
>
> *Ricard* v. *Williams*, 7 Wheat., 108-9.

The only claim of Carraher was under his timber culture entry. This was surely "at variance with the supposition of a grant," and the statute would not be put in motion by such claim so that it could ripen into a prescriptive title in fee. This claim was not of the title to the estate. It was merely a claim to an equity in the estate. What must Carraher have done under this claim to secure title? He must have complied with the Timber Culture Act, and must then have secured his patent from the United States. He could secure no such title or patent under his claim, and he was fully aware of that fact. If he had applied for it, his application would have been rejected, and his claim would have been a mere futility. It seems obviously impossible that such a claim as this could ever by any possibility ripen into a fee title. On its face it disproved the presumption of a grant so long as it was made. The statute of limitations, therefore, could not run against the fee title until after the period for Carraher to procure or attempt to procure his patent from the Government, which would be in 1896. If it run after that time the ten years required for a prescriptive title had not elapsed. It could not run before that time, under any general claim of ownership or title, for as to this Carraher had no color of title, nor had he any element of good faith or claim of right whatever.

This analysis is submitted as a sufficient reply to the reasoning of the learned court below in attempting to put the statute in motion for the purposes of a prescriptive title to the fee, while Carraher claimed nothing but a qualified right and conditional interest or equity, if we may so misuse the word, which he knew to be utterly futile and void (see Record, 40-

41); and as a sufficient answer to the labored effort of the learned counsel for defendant in error, together with the authorities relied on, pages 2 to 11 of their brief.

It still remains true, as declared by Mr. Justice Miller, that

> "where one takes possession of land without title, or claim, or color of title" (which does not mean color of some supposed right to acquire the title) "that such occupancy is not adverse to the true title, but, subservient thereto. . . . An entry by one upon land in possession, actual or constructive, of another, in order to operate as an ouster and gain possession of the parties entering must be accompanied by a claim of title. . . . there is no claim of right the possession can not be adverse to the true title."
>
> *Harvey* v. *Tyler*, 2 Wall., 349.

It is only by denying any effect whatever to the decision of the Land Department which it is admitted declared the law correctly, made in a matter undeniably within its jurisdiction, and to which Carraher was a party, and by summarily nullifying this decision, that any semblance of claim of even a qualified interest in the land on the part of Carraher can be made out. That is what the learned court below attempted. Plaintiff in error asks that this lawful and orderly administration by the Land Department, of the government of matters committed to it, shall not be thus invaded in defiance of law, and titles derived through it from the Government be brought into intolerable confusion and uncertainty, and summarily ripped up and nullified.

CHAS. A. CLARK,
WM. G. CLARK.

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DEFENDANT'S BRIEF

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 207.

Office Supreme Court, U. S.
FILED.
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JAMES H. McKENNEY,
CLERK

THE IOWA RAILROAD LAND COMPANY, PLAINTIFF IN ERROR,

vs.

CLAUDE F. BLUMER, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IOWA

HENRY C. GARDINER and CONSTANT R. MARKS,

Solicitors and of Counsel for Defendant.

In the Supreme Court of the United States.

OCTOBER TERM, 1906.

No. 207.

THE IOWA RAILROAD LAND COMPANY, PLAINTIFF IN ERROR,

vs

CLAUDE F. BLUMER, DEFENDANT IN ERROR.

DEFENDANT'S BRIEF

The question presented to this Court is a simple one. It is whether adverse possession under color of title for the period prescribed by the statute of limitations of the state of Iowa before certification by the General Land Office and the issuance of a patent will prevail against the latter. The Supreme Court of Iowa has decided that the statute of limitations had run in favor of the defendant in error and that the period of the statute should be computed from the time his grantor entered into possession under his receiver's receipt, which constituted his color and claim of title. The only remaining question then is whether under the laws of the United States and the practice of the Federal courts, the statute of Iowa is applicable to the facts in this case.

Stress is laid in the opposing argument upon the claim that

when Carraher, the grantor of defendant in error, originally took possession he recognized the paramount title to be in the United States. That from that time until the entry was cancelled in 1891, his possession was subservient to the government when it suddenly changed to hostility to the defendant. It is further contended that during all this time the title was in fact in the government and it is strenuously argued that under such circumstances adverse possession can never be made the basis for title.

That such conclusions are wholly unwarranted we have only to refer to the repeated decisions of this Court. The statute of limitations begins to run from the date of the ouster, Robinson vs. Lake, 14 Iowa, 421, and would have begun in this case when the entry was made and possession taken in 1888, but for the pendency of the appeal in the Land Office, which suspended the running of the statute until June, 1891. It was the contention of Carraher that the ultimate title was in the government and the land subject to entry. When the land department decided that the title had previously passed to the railroad company under the grant he remained in possession as before and the statute began to run against the defendant.

If this were the first case of this character before this Court the plaintiff's claim might be received with indulgence.

This Court and the Supreme Court of Iowa have held over and over again that the grant under which the defendant claimed title in this case was a grant *in præsenti*, under which title passed from the government to the railroad company upon the filing of the map of definite location, as was done in this case on October 13, 1856. (See evidence of plaintiff in error, Transcript, 23, 24, 30.)

C. R. I. & P. Ry. Co. vs. Grinnell, 51 Iowa, 476.
Sioux City &c. Co. vs. Griffey, 72 Iowa, 505.
Do. vs. Do. 143 U. S., 32.
B. & M. R. R. Co. vs. Lawson, 58 Iowa, 145.

Iowa Falls & S. C. Ry. Co. vs. Beck, 6[illegible] Iowa, 421.
C. B. & Q. R. Co. vs. Lewis, 53 Iowa, 101.
Courtright vs. Ry. Co., 35 Iowa, 386.

To hold in subservience to the government, invoking the aid of its land department and then when the railroad company obtained title, to use that holding as an honest claim of right in sustaining adverse possession against the railroad company, was upheld in Cole vs. Railroad Co., 7[illegible] Iowa, 185.

To obtain color of title and enter into possession while the title was in the government, and when the title passed to the railroad company to hold adversely against the latter until the statute had run, under the same color of title and possession, is just what was upheld in Railroad Co. vs. Allfree, 64 Iowa, 500, and Sater vs. Meadows, 68 Iowa, 507. The Court said in the first of said cases: "When the certification of the land was made, the statute began to run. The fact that defendant's prior possession could not have aided him to plead the statute against the government is no reason why he cannot plead his possession held after plaintiff acquired title." In the last case the Court said, citing the above case: "Even if his possession originated while the title was in the government, its adverse character attached and became operative from the time the title passed to the railroad company."

The case at bar is all the stronger from the fact that the color of title was obtained and possession taken after the title had passed from the government, instead of before.

It was said in argument before the state courts that the burden is on the defendant in error to show a change in the character of his holdings after the cancellation of his timber culture entry, but the cases cited in support of the statement contain no such doctrine. On the contrary, as the Supreme Court of Iowa has said, "Like an army of occupation, his flag was constantly unfurled. Each day and each year as he entered upon the land to plow, sow, cultivate and reap, there was a *distinct assertion* of his

claim of right to the land. When the railroad company acquired the title, this open and actual possession was held by the plaintiff, and it continued for more than ten years after that and before the conveyance to the plaintiff. Nothing more than this was necessary, and under these circumstances we think *it was wholly immaterial whether the defendants claim of right or color of title originated before or after the railroad company acquired title.*"

Tremaine vs. Weatherby, 58 Iowa, 615, 621.

Not only is such the holding of the Supreme Court of Iowa, but it is the general rule of all courts of last resort that the statute of limitations will begin to run against one claiming title from the government from the date of his compliance with the requirements of the government in favor of one holding adverse possession of the real estate.

Dolen vs. Black, 67 N. W. R., 760. (Neb.)
Udell vs. Peak, 7 S. W. R., 786. (Tex.)
Patten vs. Scott, 12 A., 292. (Pa.)
Hayes vs. Martin, 45 Cal., 559.

The attitude of plaintiff in error toward the land in controversy, as shown by its acts, its arguments, its pleadings and the evidence in this case, is simply this: For the purpose of defeating the title of the defendant in error and escaping the burden of taxation, the title has at all times vested in the government of the United States. For every other purpose, and particularly for the ultimate purpose of acquiring and enjoying the land, the title and ownership has always been, and now is, in the plaintiff.

The plaintiff argues that, while no question as to the land being reserved from the grant now exists, or has been raised for more than ten years before the bringing of this suit, and the title sufficiently vests in the plaintiff in error, the statute ought not to be held to run against the plaintiff until after the certificate as to mining claims was made by the land office in January, 1903.

Paragraph 6 of defendant's answer is as follows: "That as

defendant is advised and states said Land Commissioner has at all times held said land to be rightfully subject to certification and conveyance to said Railroad Company under said grant, but has *neglected* and failed to make such certification and conveyance, etc." Transcript, 3

The witness Burdett testified for the defendant:

"Thereafter, effort was made to secure the due certification of the land under the grant, resulting in a promise from the proper officials of the General Land Office, given on or about October 1, 1891, that the tract would be included in a patent which was then about to be prepared. * * * The duty of certifying the tract rested with the proper officials of the office, *and was in fact a mere clerical duty*." Transcript, 19, 20.

Again, "Down to a very recent date the railroad division of the General Land Office has been overburdened with work. * * * For most of the time during that period the force of clerks in that division was insufficient to promptly perform the necessary labor attendant upon such adjustments and the conveyance of lands under the grants." Transcript, 21.

We thus see by defendant's own allegations and evidence that the land office has at all times since Carraher's appeal was disposed of in 1891, and in fact always prior thereto, held that the land passed to the railroad company under the grant, and that the duty of so certifying was a mere clerical one which was delayed because the clerks were overburdened with work. For the purpose of preventing the statute from running and defeating the title of the plaintiff, defendant now seeks to turn this clerical duty and delay into an exercise of "jurisdiction" by the land department.

The certificate as to mining claims was a mere matter of detail connected with the certification and tended in no way to show that the railroad company had not acquired ownership under the grant of thirty years before. As the Supreme Court of

Iowa said in its opinion: "On the contrary the investigation resulted in confirming such ownership during this long period. As observed in Barden vs. N. P. Ry. Co., 154 U. S., 288, the delay of the government in issuing a patent does not affect the power of the company to assert in the meantime, by possessory action, its rights to the land which are in fact non-mineral."

The cases cited by counsel do not support the contention made. None of them go farther than to hold that the time during which the question of title to the land was pending in the land department cannot be counted in determining whether the statute of limitations has run, that the operation of the statute is suspended during a contest in the land office. The act of March 3, 1887, can have no application, for it provides merely for the recovery of land erroneously conveyed or certified by the government, thus specifically recognizing that the title to such lands had previously passed to the railroad companies. It did not purport to disturb the ownership of lands already earned and no adjustment of this grant was attempted.

The case of Barden vs. Northern Pacific Railroad, 154, U. S., 288, was a direct action brought by the railroad company to recover lands under the grant, which especially excepted lands known to be mineral. The Court distinguished in principle the application of the rule to lands which passed under the grant, and those which were excepted, in the following language, page 315: "The cases cited in support of the claim of plaintiff only show that the identification of the sections granted and of the exceptions therefrom of parcels of land previously disposed of, leaves the title of the remaining sections or parts thereof, *to attach as of the date of the grant.*"

If this case has any application to the case at bar it is this: That the title to the land in controversy passed to the defendant's grantor as of the date of the grant, and the delay of the government in certifying the land did not affect the power of defendant

to assert its title, and that therefore the statute would run in favor of plaintiff claiming title by adverse possession.

The Minnesota case of Railroad Co. vs. Olson, 91 N. W., 294, merely decided that the statute of limitations was suspended during the contest initiated by the defendant in the land office. The argument of counsel that Carraher was holding in subservience to the government under an attempt to obtain the title, and his possession was not, therefore, adverse, the court disposes of in the following language: "The mere fact that the defendant took possession of the land believing that the title thereto was in the United States, and intended by his possession to secure it by virtue of a homestead entry, would not prevent his possession from being adverse as against the plaintiff within the legal meaning of the term. And we assume that the plaintiff, by virtue of the congressional land grant, the completion of its railway, and the filing of the certificate of that fact, acquired such title to the land in question that it could at all times thereafter have maintained an action to recover the possession thereof, unless the litigation and proceedings in the land department operated to suspend its right to maintain such an action."

To the same effect are the Iowa cases of Dickerson vs. Yetzer, 53 Iowa, 681, and Grant vs. Railroad Co., 54 Iowa, 673, the Court merely holding that the lands were not taxable while a contest was pending in the land department, and the latter case arose under the grant of October 28, 1874, which contained a different provision regarding the certification of the lands. The Court said: "But under this act (May 15, 1856,) no certificate by the land department of the government is required. Iowa Homestead Co. vs. Webster County, 21 Iowa, 221."

In the case of Churchill vs. Sowards, 78 Iowa, 473, the defendant claimed under a tax title, the plaintiff under a military land warrant. The patent had not issued for this land when the tax deed was obtained, and such lands were not taxable until

three years after the issue of the patent. Moreover, the plaintiff's grantor, through a mistake, entered and obtained a patent for the wrong tract of land, and the Court rightly held that until a patent correctly describing the land was issued, the title was in the government and the statute of limitations did not run.

In Durham vs. Hussman, 88 Iowa, 36, the Court held that an entry under a forged assignment of a bounty land warrant which was concelled, gave the assignee no such interest in the land after such cancellation as rendered it subject to taxation.

The case of U. S. vs. Montana Mfg. Co., 196 U. S., 577, was a suit brought by the government to recover certain timber growing upon granted land, the court holding that under the special act, until identification of the sections the government retains a special interest in the timber growing upon the lands, which can have no bearing upon the case before us.

The case of Gibson vs. Chouteau, 13 Wall., 92, contains language which may be construed to indicate that the legal title must have passed from the government. This was an action in ejectment, the plaintiff's title being founded upon a location and patent under an Act of Congress of 1815, the provisions of which are not given in the opinion. The case turned, however, upon the distinctions observed in the Federal courts and in the courts of Missouri between legal and equitable proceedings, the Court saying: "The action of ejectment can only be sustained upon the possession by plaintiff of the legal title. For the enforcement of equitable rights, however, distinct equitable proceedings must be instituted. * * * If other parties possess equities superior to those of the patentee, upon which the patent issued, a court of equity will, upon proper proceedings, enforce such equities by compelling a transfer of the legal title, or enjoining its enforcement, or canceling the patent." As this distinction does not prevail under the practice of the state of Iowa, and as this was originally a suit in equity for the enforcement of such

equities as the Court referred to, it is difficult to see the application of this case to the case now before this Court. The case of Litchfield vs. Register & Receiver, 9 Wall., 578, merely decides that the courts will not interfere to control the action of the land officers. To the same effect is Humbird vs. Avery, 195 U. S., 480, and in the latter case the land was without the place limits and within the indemnity limits of the grant. In such case a different rule obtains.

As we have said, the argument that the doctrine of adverse possession is not applicable to the land in controversy until certification by the Land Department and Secretary of the Interior, is not a new one. It was first made more than forty years ago and has been continuously urged whenever a similar case has arisen. Not only have the courts settled the same question when arising under similar grants, but have disposed of the same argument as applied to the same grant and the same railroad from which the plaintiff in error derived its title. Thus, in Iowa Homestead Co. vs. Webster Co., 21 Iowa, 235, the Court said: "The argument against it is, that not until the lists are finally certified by the commissioner, can it be definitely known to what precise lands, by sections or parts of sections, the company will be entitled. And yet it is undeniably true, that upon the completion of so much of the line (within the time and in the manner fixed by the Act, as to which there is no question) the company was legally and absolutely entitled to this quantity of land. * * * And this, too, though the certificate of the Governor, and the final certificate at the department at Washington should not be made for months afterwards. In other words these subsequent acts would be but the perfection of the *evidence* of title, while the *fact* of completion would form the true basis of the right, and at once vest the interest." See also

Dubuque & Pacific Ry. Co., vs. Webster Co., 21 Iowa, 235.
C. B. & Q. Ry. Co. vs. Lewis, 52 Iowa, 101, 115.

Whitehead vs. Plummer, 76 Iowa, 181.
Cole vs. Des Moines Valley Ry. Co., 76 Iowa, 185.

The claim of one entering land for the purpose of ultimately acquiring title from the government by compliance with its laws, is just as hostile to all others as though the patent had been issued, although it is subservient to the government. The great weight of authority is that the claim of one who thus enters land may be subservient to the government if hostile to everybody else.

Clemens vs. Runckle, 84 Am. D., 69. (Mo.)
Mather vs. Walsh, 17 S. W., 755. (Mo.)
Moore vs. Bronfield, 34 Pac., 199. (Wash.)
Lord vs. Sawyer, 57 Cal., 65.
Alabama State Land Co. vs. Kyle, 13 So. (Ala.) 43.
Francoeur vs. Newhouse, 43 Fed., 236.
Northern Pacific R. Co. vs. Kranrich, 52 Fed., 911.
Railway Co. vs. Townsend, 86 N. W., 1007. (Minn.)

The court said in the first of the above cases: "The defendant, and those under whom he claims, did not enter or hold under the plaintiff. They did not recognize his title. They had no privity with him. They do not appear even to have known of the existenc of his title. They recognized a title in another person' the United States', who was supposed to be the proprietor, and as to the United States their possession was not hostile; but they did expect to acquire the title of the United States, believing themselves to have right of pre-emption to the exclusion of all other persons, and a present right to the use and possession of the land. The defendant has the actual possession, within the meaning of the statute of limitations, with a claim not of absolute title, but of a right which was adverse to all other persons."

As between individuals the statute of limitations begins to run from the time the party entering the land did all required of him to perfect his purchase. The claim thus becomes one of ownership and lacks only the paper title to make the claim com-

plete. It then ceases to be subservient to and becomes adverse to the government. If the title is in fact earned, the government retains nothing but the naked legal title and the claimant is the real owner. The land becomes segregated from the public domain and is private property.

Carroll vs. Patrick, 37 N. W., 671. (Nebr.)
Nichols vs. Council, 14 Am. St., 20. (Ark.)
Cavender vs. Smith, 56 Am. D., 541. (Iowa.)
Cady vs. Eigmey, 7 N. W., 102. (Iowa.)
Steele vs. Boley, 22 P., (Utah) 311.
Wirth vs. Branson, 98 U. S., 118.
Stark vs. Starr, 6 Wall., 402.

This Court has frequently announced the same conclusions as applied to the grant in this case and similar grants.

Thus, in Desert Salt Co. vs. Tarpy, 142 U. S., 241, the Court held that the patents were issued, not for the purpose of transferring title, but as *evidence* that the grantee had complied with the conditions of the grant, and that the railroad company had such title as would sustain an action for the recovery of the land.

The case of Toltec Ranch Co. vs Cook, 191 U. S., 532, is on all fours with the case at bar and repays a careful examination, the opinion repeating the doctrine previously announced by this Court, that adverse possession under the statute of a state after the act granting the land and before a patent issued will prevail against the patent title. An examination of the argument for plaintiff in error shows that counsel in that case cited many of the same cases and used the same arguments as do counsel in this case, but the Court distinguished them as not applying to the facts or the principles of the case.

See also as sustaining the same conclusions,

Van Wyck vs. Knowles, 106 U. S., 360.
Kan. Pac. Ry. Co. vs. Dunmyer, 113 U. S., 629.
New Orleans Pac. Ry. Co. vs. Parker, 143 U. S., 42.
Railroad Co. vs. Griffey, *Supra*.
Wisconsin Cent. Ry. Co. vs. Price, 133 U. S., 496.
Sharon vs. Tucker, 144 U. S., 533.

Why the certificate from the mineral division of the land department should be more important than a similar certificate as to swamp lands made two days later, does not appear. But the testimony of the plaintiff in error shows that the officers of the land department had passed on both of these matters prior to the entry by Carraher in 1888.

The claim of the state under the swamp land selection was finally rejected February 26, 1878. Transcript, 18.

Attached to the selection of this land made by the railroad company under the grant, was the affidavit of N. D. Parkhurst, the land agent of the company, stating that this land is vacant, unappropriated, and not interdicted mineral or reserve lands, and is of the character contemplated by the grant. The certificate of the Register and of the Receiver of the Land Office at Des Moines is also attached to said list, dated May 13, 1885, showing that they have carefully and accurately examined said list, and certifying that the filing thereof is allowed and approved; that no part thereof is returned or denominated mineral lands, nor claimed as swamp land, nor is there any valid claim to any portion of said lands on file or recorded in their office. Transcript, 26.

It is a matter of common knowledge that, under the practice of the land office, the final certificate of the Commissioner and of the Secretary are based upon the certificate of the officers of the local land office. The clerks in the department examine these certificates, and if found correct and in proper form, they prepare certificates for execution by the Commissioner and Secretary, and, as stated for the defendant by the witness Burdett, who was himself formerly Commissioner of the Land Department, the duty of certifying the tract *was in fact a mere clerical duty.*

No claim has ever been made that the land in controversy did not pass under the grant by reason of its being mineral land. In Toltec Ranch Co. vs. Cook, the Court in distinguishing that

case from the Barden case, said of the latter case: "In other words, mineral lands were not conveyed, whether known or unknown to be such at the time of the grant. * * * But it was not intimated nor does it follow, that the conveyance of the title to the company was by the patent and not by the granting act. * * * The case decided only that lands did not pass by the grant which were reserved from it. An evident proposition, whatever might have been the difficulties in determining what lands were reserved."

The land in controversy was not reserved from the grant, as the evidence shows, and applying the reasoning of the above case, the conveyance of the title was by the grant and not by the certification or patent, whatever might have been the delays or difficulties in their issuance. As said by this Court, they are the perfection of evidence of title, not the conveyance of title.

We are firmly of the opinion that a careful consideration of this case and an examination of the authorities cited will convince the Court that these conclusions are right, that the judgment of the Supreme Court of Iowa was just and should be affirmed.

Respectfully submitted,

HENRY C. GARDINER,
CONSTANT R. MARKS,
Solicitors and of Counsel for Defendant.

We wish to call the Court's attention to the fact that no assignment of errors or prayer for reversal was annexed to or returned with the writ of error for the removal of this case to this Court, or appears in the transcript of record in this case, as required by section 997 of the Revised Statutes of the United States. There is, therefore, nothing before this Court for its consideration, and under section 4 of Rule 21 of the Rules of this

Court, the counsel for plaintiff will not be heard unless requested by the Court.

We, therefore pray this honorable Court to dismiss the writ of error issued in this case, and for such further judgment as will protect the rights and interests of the defendant.

HENRY C. GARDINER,
CONSTANT R. MARKS,
Attorneys for Defendant.

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Supreme Court of the United States.

No. 207.—October Term, 1906.

Iowa Railroad Land Company, Plaintiff in Error, *vs.* Claude F. Blumer.	In error to the Supreme Court of the State of Iowa.

[May 27, 1907.]

This is a writ of error to the Supreme Court of the State of Iowa, seeking ersal of its judgment affirming the decree of the District Court of Wood- y County, quieting the land title of Claude F. Blumer, defendant in error, against the Iowa Railroad Land Company, plaintiff in error. (129 a, 32.) The record discloses that Blumer brought his action by a peti- in equity under the Iowa Code, claiming to be owner in fee simple orty acres of land in Woodbury County, Iowa, being the N. E. ¼ of the E. ¼ of section 1, township 89 north, range 46 west, containing about y acres; averring that the plaintiff and his immediate grantor had n in open, notorious, continuous and adverse possession for more than years under a claim of title and that the plaintiff was then in the session of the same; and that defendant made some claim to the said te, and prayed that he be quieted in his title and that defendant be pped from setting up any claim adverse to his own.

Defendant answered and set up general denials and that the defendant s the owner of the premises by virtue of an act of Congress of May 15, 56, making a grant of lands to the State of Iowa in alternate sections in of the construction of certain railways in that State, whereby the lands re granted to the State of Iowa in trust for the railway companies; that act and trust were duly accepted by the State of Iowa, by act of its islature, approved July 14, 1856; that thereafter, by the act of April 7, 58, of the same State legislature, the Iowa Falls & Sioux City Railroad mpany was designated to construct and complete the portion of the rail- d west of Iowa Falls, and the State granted, on conditions contained in d act, the unearned portions of said lands west of Iowa Falls to the d Iowa Falls & Sioux City Railroad Company, and that all the terms the act had been complied with and that the same were rightfully subject the certification and conveyance to the said railway company, which was grantor of the defendant.

A reply and amendment were filed, and also a supplemental answer set- g forth that the lands on the 24th of January, 1903, since the former

answer in the case, had been duly certified to the State of Iowa in trust for the Iowa Falls and Sioux City Railroad Company, and had been subsequently patented to the railroad company by the Governor of the State on February 2, 1903, and that all the rights and title of the railway company had been succeeded to by the defendant, the Iowa Railroad Land Company, and prayed to be quieted in its title as against the plaintiff. By an amended reply the plaintiff reiterated that for more than ten years prior to the commencement of the suit, plaintiff and his immediate grantor had been in open, notorious, continuous and adverse possession of the premises under a claim of right and color of title, and that plaintiff was then in possession of the same.

The lands in question are within the place limits of the grant to the State of Iowa by the act of May 15, 1856. (11 Stat., 9.) By the act of the legislature of Iowa, passed July 14, 1856, the lands were granted to the Dubuque & Pacific Railroad Company. The map of definite location of the line of the road was filed in the office of the Commissioner of the General Land Office of the United States on October 11, 1856, and accepted on October 13, 1856.

The legislature of Iowa, on April 7, 1868, passed a statute (Iowa Laws, 1868, chap. 124, pp. 164–167,) designating the Iowa Falls & Sioux City Railroad Company, (grantor of the plaintiff in error) to construct and complete the uncompleted portion of the road west of Iowa Falls. Sec. 1 of the act legalized and confirmed the contract between the Dubuque and Sioux City Railroad Company and the Iowa Falls & Sioux City Railroad Company "transferring so much of the Dubuque and Sioux City [successor of the Dubuque and Pacific] Railroad as remains to be constructed, together with the franchises, right of way, depot grounds, and other appurtenances of said road to be completed, also transferring all right and title of the said Dubuque and Sioux City Railroad Company to so much of the lands granted by Congress to aid in the construction of said road as shall appertain to, or be legally applicable to the construction of the uncompleted part of the Dubuque and Sioux City Railroad, as aforesaid, except as to the lands hereinafter granted to the Dubuque, Bellevue and Sabula Railroad Company." Sec. 4 of that act provides "That so much of land grant as is applicable to the uncompleted portion of the road aforesaid, west of Iowa Falls . . . is hereby conferred upon the said Iowa Falls & Sioux City Railroad Company, subject to the terms and conditions of the act of Congress granting the said lands, dated the 15th day of May, A. D. 1856, and the act amendatory thereto and the act of Congress passed the present session" (subject to certain conditions as to the time and manner of construction).

The railroad company complied with this act as to the completion of the road, having done so by January 1, 1872, also complying with the act of

Congress of March 2, 1868, (15 Stat. 38) requiring the completion of the road by that date. The tract of land in controversy was again selected and designated by the Iowa Falls & Sioux City Railroad Company, on June 19, 1884, and on April 24, 1885, as lands to which the company was entitled under said land grants, and said last named selection was accepted by the register and receiver, and certified to the Commissioner of the General Land Office at Washington, May 13, 1885.

In December, 1858, the lands were listed for the benefit of the Dubuque & Pacific (since Iowa Falls & Sioux City) grant under the act of May 15, 1856, but afterwards, on February 21, 1859, the tract was included in a selection of the State of Iowa under the Swamp Land Grant. Under the order of the Secretary of the Interior the lands were stricken from the certified list with a view of determining the claim of the State under the Swamp Land Grant, which claim was finally rejected on February 16, 1878.

The lands were certified pending the suit, January 20, 1903, and on February 2, 1903, the lands were patented by the Governor of Iowa to the Iowa Falls & Sioux City Railroad Company.

On October 2, 1883, John Carraher (predecessor in title of the defendant in error) made application to the local land office at Des Moines, Iowa, to enter the lands under the Timber Culture Act (20 Stat. 113.) His application was rejected and Carraher appealed. The rejection was because of conflict with the railroad grant. On December 3, 1883, the Commissioner affirmed this action. Carraher appealed to the Secretary of the Interior. Afterwards, July 17, 1891, the Secretary approved the decisions and rejected the claim of Carraher. Pending his appeal, on May 31, 1888, Carraher made another timber culture entry, (No. 607.) When the Secretary's decision of June 17, 1891, finally rejecting the first application of Carraher was promulgated by the Commissioner, (July 11, 1891,) it was also directed that the second timber culture entry (of May 31, 1888,) be cancelled on the ground that it had been allowed without authority.

The delay in certifying the lands after the final decision against Carraher is thus accounted for by Mr. Samuel S. Burdett, at one time Commissioner of the General Land Office, and attorney for the plaintiff in error from June, 1888.

"On July 15, 1891, my firm advised the Iowa Railroad Land Company of the Commissioner's action of July 11, 1891, in which the Carraher entry had been cancelled and received in reply the letter thereto attached and marked "Exhibit "B" from P. E. Hall, president, dated July 28, 1891, in which he asked that we "take such steps as will result in the tract in question being certified to the State for our benefit."

"Thereafter, by personal application by myself and other members of my firm, effort was made to secure the due certification of the land under the

grant, resulting in a promise from the proper officials of the General Land Office, given on or about October 1, 1891, that the tract would be included in a patent which was then about to be prepared. . . .

"The duty of certifying the tract rested with the proper officials of the General Land Office, and was in fact a mere clerical duty. No rule required the filing of an application in writing for the certification of lands embraced in a pending selection, and the practice of my firm in such matters was to urge, by personal request, the proper officials of the General Land Office to take up such lists and prepare the necessary certificate for the action of the Commissioner and Secretary. This was what was done with respect to the tract in question here, and our requests in the matter resulted in the promise that the land would be included in a patent, such as set out in my firm's letter of that date, to P. E. Hall, president, Exhibit "C." In the multitude of business transacted by my firm in the years succeeding the action referred to, it is impossible for me recollect the details of this particular matter, nor do I recollect the circumstances under which the promise referred to in said letter was given, but that it was made to me or to some member of my firm, as a result of urgent requests for proper action, is certain, or the said letter of my firm, of October 1, 1891, Exhibit "C," would not have been written. It was the practice of my firm, in all matters in our hands from time to time, to call them up by personal application, with a view to securing action. When the certification finally issued on January 22, 1903, it was in response to a personal and urgent request from my firm.

"I know of no delay whatever caused by either the Iowa Railroad Land Company or its predecessors in interest, or by any of its agents or attorneys, and certainly none by myself or my firm in securing the final issuance of title by the United States to the tract of land in question. The delay in certifying the said land, after the Secretary's action of July 17, 1891, was wholly due to the want of action by the General Land Office, the Company and its agents having performed every duty in timely manner required by the rules of the Department.

"The first cause of delay in final certification of said tract under the aforesaid railroad grant of May 15, 1856, was the selection by the State of Iowa, under the swamp land grant of 1850, which was filed February 21, 1859, and embraced said tract, which selection was not finally disposed of by the Land Department until 1878.

"The next cause of delay was the appeal of John Carraher from the decision of the Commissioner of the General Land Office, dated December 3, 1883, to make entry of said tract under the provision of the timber culture law. Delay was next caused by the loss of Carraher's application papers in the General Land Office, which is mentioned in the letter of the Commissioner to Mr. Van Deventer, dated September 6, 1887, Doc. No. 1, of this deposition, and in that of the Commissioner to Geo. W. Wakefield, Esq., Doc. No. 4, of this deposition. The next cause of delay appears to have grown out of the contention made in behalf of Carraher in support of his appeal, that the railroad grant had been fully satisfied, and that this tract was not needed to fill up the quota of lands due under the grant. This made necessary the adjustment of the grant which took place on April 9, 1891, as already detailed.

"Thereafter the Secretary disposed of Carraher's appeal on June 17, 1891. The delay in certifying the land under grant which subsequently ensued, occurred in the General Land Office. As to the causes of this last delay, I have no certain knowledge, but I can state it as a fact, that between the date of the Secretary's final decision on the Carraher application, down to a very recent date, the railroad division of the General Land Office has been overburdened with work consequent upon the duty of adjusting all of the railroad land grants made by Congress in aid of railroads, which was cast upon the Land Department by the provisions of the Act of March 3, 1887, 24 Stats. at Large, p. 556. For the most of the time during that period the force of clerks in that division was insufficient to promptly perform the necessary labor attendant upon such adjustments and the conveyance of lands under the grants. The delay in certifying the tract in question may have been due to these conditions."

Mr. Justice DAY delivered the opinion of the Court.

The original grant of May, 1856, was *in praesenti*. The title passed from the United States and vested in the State of Iowa on October 13, 1856, when the map of definite location was lodged in the General Land Office, and the right of the company then attached. (*Iowa Falls Land Company* v. *Griffy*, 143 U. S. 32.)

Under the decisions made by this court in *Desert Salt Company* v. *Tarpey*, 142 U. S. 241, and *Toltec Ranch Company* v. *Cook*, 191 U. S. 532, notwithstanding the patent had not been issued, the railway company, grantor of the plaintiff in error, having succeeded to the right and title of the original company and complied with all the terms and conditions of the grant, as required in the legislation of Congress and the acts of the Iowa legislature after the acceptance of the grant by the State, was in a position and clothed with the requisite title in order to transmit the same to another who might have recovered possession of the lands, and it could itself have brought an action in ejectment to oust one holding adverse possession thereof, and being clothed with these rights was in such position that the Statute of Limitations would run against it in favor of one who occupied the premises by adverse possession under color of title. This was distinctly decided in the Toltec Ranch Company case, wherein it was held that the Statute of Limitations would run against the railroad company, thus situated toward the lands, although the patent had not issued.

It is sought to withdraw this case from the application of the doctrine of *Salt Co.* v. *Tarpey*, and *Toltec Ranch Company* v. *Cook*. It is argued that § 4 of the act of May, 1856, provided that if the roads were not completed in ten years the unsold lands should revert to the United States; that on March 10, 1868, the State of Iowa resumed the grant of lands as made to the original grantees; that by act of June 2, 1864, Congress provided in section 8:

"That no lands hereby granted shall be certified to either of said companies until the Governor of the State of Iowa shall certify to the Secretary of the Interior that the said company has completed, ready for the rolling stock, within one year from the first day of July next, a section of not less than twenty miles from the present terminus of the completed portion of said railroad, and in each year thereafter an additional section of twenty miles; but the number of sections per mile originally authorized shall be certified to each company, upon proof, as aforesaid, of the completion of the additional sections of the road as aforesaid; and upon the failure of either company to complete either section as aforesaid, to be annually built, the portion of the land remaining uncertified shall become subject to the control and disposition of the legislature of the State of Iowa, to aid in the completion of such road."

And, it is argued, that the effect of this section was to hold the legal title until the railways were built and completed, as therein specified, and that the Iowa Falls and Sioux City Railroad Company never took the legal title to the lands in controversy until certified under section 8, of the act of 1864, which, it is alleged, was not until January 20, 1903, followed by the Governor's patent of February 2, 1903.

But when the grant is *in praesenti*, and nothing remains to be done for the administration of the grant in the Land Department, and the conditions of the grant have been complied with and the grant fully earned, as in this case, notwithstanding the want of final certification and the issue of the patent, the railroad company had such title as would enable it to maintain ejectment against one wrongfully on the lands, and title by prescription would run against it in favor of one in adverse possession under color of title. *Salt Co.* v. *Tarpey*, and *Toltec Ranch Co.* v. *Cook*, *supra*.

Applying and giving weight to the decisions thus recently rendered in this court, we think the debatable proposition in the case concerns not the title of the railway company, or its right to have maintained an action to recover the premises, but involves the right of Carraher, and the defendant in error as his successor, to claim the title to the premises by adverse possession.

We think the record discloses that for more than ten years required by the Iowa statute to ripen such title, Carraher was in possession of the premises. He had planted a large number of trees; caused the lands to be cultivated; had raised crops; had rented the lands to others, and was understood to be claiming the ownership. The answer of plaintiff in error to this claim of title is that Carraher was not in possession of the premises claiming title in good faith.

The record shows that in 1883, by an entry under the Timber Culture Act, Carraher claimed this forty acre tract. As we have seen in the statement preceding this opinion, his application was rejected by the Register of the General Land Office, whose decision was affirmed by the Commissioner

and ultimately by the Secretary of the Interior. Pending his appeal, Carraher made a second application for the lands to the Register of the Land Office, and a receiver's receipt was issued to him. This receiver's receipt was dated May 31, 1888, and is as follows:

"Receivers Receipt No. 607. Application No. 607.

Receiver's Office, Des Moines, Iowa, May 31st, 1888.

Received of John Carraher the sum of Nine Dollars —— cents, being the amount of fee and compensation of Register and Receiver for the entry of Northeast —— of N. E. quarter of Section one, in township 89 of range 46, under the first section of the act of Congress approved June 14th, 1878, entitled 'An act to amend an act entitled an act to encourage the growth of timber on the Western Prairies.'

$9.00. M. V. McHENRY, *Receiver.*

Endorsed: State of Iowa, Woodbury County, Filed for record this 9th day of Dec., 1891, at 2 o'clock P. M., and recorded in Book 40 Lands, page 162, C. A. DeMun, Recorder. P. Shontz, Deputy."

It was enclosed to Carraher in a letter, of which the following is a copy:

"Mr. John Carraher. Sioux City, Iowa, June 2, 1888.

My Dear Sir: I have the pleasure of handing you herewith your timber culture entry Receiver's receipt No. 607 for N. E. ¼ of N. E. ¼, 1, 89, 46.

Respectfully, GEO. W. WAKEFIELD.

P. S. You can take possession and proceed to comply with the timber culture laws."

After this receiver's receipt and letter, Carraher went into possession in the manner we have already stated and held it until 1901, when, shortly before his death, he conveyed the premises to the defendant in error. The contention is that this possession could not have been in good faith with any expectation of obtaining title from the Government at the conclusion of the eight years required by law in which to earn it; that Carraher knew that his first application under the Timber Culture Act had been rejected, and afterwards that decision was affirmed on appeal in 1891, and that he could not have continued in the occupation of the premises in good faith under claim of title.

The record shows that when the Secretary of the Interior (July 11, 1891,) affirmed the decision against Carraher's first timber culture entry the Commissioner in advising the Register and Receiver at Des Moines by letter of July 13, 1891, of that decision, added: "It appears that on May 31, 1888, more than three years after the rejection of his application, and while his case was pending before the Secretary of the Interior on appeal, your office allowed Carraher to make timber culture entry 607 of the land. The action was without authority and the entry has this day been cancelled." It does not appear that Carraher was notified that this entry 607 had

been cancelled, nor was he ever called upon to appear in reference to the same, and the letter of the Commissioner discloses that the Register of the Land Office at Des Moines should not have allowed the entry to be made and that it was summarily cancelled without notice or hearing. Carraher had been advised by the letter from his counsel, who had become a judge of a court in Iowa, that he might take possession and proceed to comply with the timber culture law. As far as the record shows, he heard nothing further from his entry, knew nothing of its summary cancellation, and no attempt was made to disturb his possession of the premises.

The Supreme Court of Iowa held that there was nothing in these facts to show that Carraher was not acting in good faith, and with the belief that he would acquire title under the last entry under the Timber Culture Act, and we are not prepared to disturb this holding.

After 1891, as we have seen, the railway company was in position to have ousted him from the premises and asserted its superior title and right. It did not attempt to do this, and so far as the record discloses made no objection to Carraher planting and cultivating the trees required by the act of Congress to perfect his title under the second application. His possession was certainly open, notorious, continuous and adverse, and unless he was acting in bad faith, was such as would ripen into full title as against the railway company, it failing to assert its rights within the period of the Statute of Limitations. While until the time had run required by the Timber Culture Act, Carraher would have been in no position to claim title as against the Government, he was occupying a hostile attitude toward the railway company, and, while recognizing title in the United States, he expected to acquire title from it, had excluded all others from the use and occupation of the land and held under no other title. The Supreme Court of Iowa has held that under such circumstances the statute of limitations of Iowa would run in his favor as against the railroad company, and we find no reason to disturb that conclusion. And for more than ten years that company was in such position under its grant that it might have maintained an action in ejectment and asserted its title to the premises as against Carraher.

We find no error in the judgment of the Supreme Court of Iowa and it will be

Affirmed.

Mr. Justice Brewer concurs in the judgment.

True copy.

Test:

Clerk Supreme Court, U. S.